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No. 95-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CMC HEARTLAND PARTNERS,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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July 2, 1996

QUESTION PRESENTED

This case presents an important and recurring question of federal bankruptcy law on which the circuits are sharply divided: does a federal bankruptcy "claim" based on state law arise at the time when the conduct underlying the claim occurs, or at the time when state law creates a cause of action imposing liability for that conduct?

PARTIES TO THE PROCEEDING

Petitioner, CMC Heartland Partners, was appellant below. Respondent, Union Pacific Railroad Company, was appellee below.

Pursuant to this Court's Rule 29.6, petitioner notes that it is a Delaware general partnership with two general partners: (1) Heartland Partners, L.P., which owns 99.99% of the partnership, and (2) Milwaukee Land Company, which owns .01% of the partnership. Heartland Partners, L.P. is a publicly-held Delaware limited partnership, whose general partner is Milwaukee Land Company. Milwaukee Land Company is a publicly-held Delaware corporation.

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CMC Heartland Partners respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The two opinions of the Court of Appeals for the Seventh Circuit are reported at 78 F.3d 285 (1996), and 3 F.3d 200 (1993), and are reprinted at Appendix ("App.") 1a-18a and 19a-34a respectively.

The District Court's unreported order consummating the Milwaukee Road bankruptcy is reprinted at App. 65a-74a. The District Court's first order upholding respondent's post-discharge state-law claim against petitioner is reported at 1992 WL 316321, and reprinted at App. 37a-46a. The District Court's second order upholding that claim is reported at 1994 WL 722053, and reprinted at App. 47a-64a.

JURISDICTION

The most recent judgment of the Court of Appeals was entered on February 28, 1996. CMC Heartland Partners filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc, which was denied on April 3, 1996. App. 35a-36a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

The Bankruptcy Act of 1898 defined a "claim" as, *inter alia*, "debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character." 11 U.S.C. § 205(b) (repealed 1978).

The Bankruptcy Code of 1978 defines a "claim" as, *inter alia*, a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5).

STATEMENT OF THE CASE

This case involves a dispute over liability for an environmental clean-up of a former railyard located in Tacoma, Washington. The property was owned from the early years of this century by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company ("Milwaukee Road"). App. at 24a. Like many other railroads, the Milwaukee Road fell into financial straits in the 1960s and 70s. The company filed a petition for bankruptcy reorganization on December 19, 1977, in the United States District Court for the Northern District of Illinois. *Id.* at 23a.

A. Union Pacific Purchases the Tacoma Railyard

As part of the reorganization process, the bankruptcy trustee placed the Milwaukee Road's Tacoma railyard on the market. On March 28, 1980, respondent Union Pacific Railroad Company agreed to purchase the property. The purchase agreement included a clause by which the bankruptcy trustee and the Milwaukee Road agreed to indemnify Union Pacific and its subsidiaries "against any and all claims, damages, liabilities, losses or demands whatsoever, and expenses in connection therewith, including reasonable fees of outside counsel, regardless of the source or nature thereof, arising out of the operation of the Properties prior to March 12, 1980." App. at 23a. The bankruptcy court authorized the purchase, and the trustee conveyed the property by quitclaim deed on December 19, 1980. *Id.* at 24a.

Union Pacific was under no illusion that the Tacoma railyard was in a pristine state. To the contrary, Union Pacific engineers who inspected the property in April 1980 observed (among other things): "[The d]iesel fueling area is oil saturated and will probably require removal of surface oil as well as contaminated dirt. Apparently, this covers quite a large area and may require extensive clean-up." *Id.* at 25a. Thus, it came as no surprise when the United States Environmental Protection Agency ("EPA") in October 1981 designated the entire Commencement Bay and the Nearshore Tideflats area (including the Tacoma

railyard) as a federal Superfund site. *See id.*.[1] Finally, in January 1982, an environmental study commissioned by the Washington State Department of Ecology concluded (among other things) that many hazardous materials had been spilled at the railyard and that accordingly "the soils at this site are possibly permeated with toxic compounds." *Id.* at 26a.[2]

B. The Bankruptcy Reorganization Is Completed

By 1985, the District Court was winding up the Milwaukee Road bankruptcy reorganization. On July 12, 1985, the Court confirmed a comprehensive reorganization plan. The plan required all post-petition claims (*i.e.*, claims against the Milwaukee Road arising *after* the bankruptcy petition was filed) to be filed on or before the "claims bar date" of September 10, 1985. After that date, all further post-petition claims against the bankruptcy trustee, the Milwaukee Road, and the latter's successors and assigns would be barred in perpetuity unless "based on *facts* that are unknown, undisclosed and unasserted" as of that date. App. at 24a (emphasis added).

Union Pacific actively participated in the Milwaukee Road bankruptcy proceedings, filing several claims against the bankruptcy estate and negotiating with the trustee. App. at 24a, 38a. Accordingly, Union Pacific and its legal counsel were on the official service list for the reorganization, and received notice of the claims bar dates, notice of the hearings regarding the reorganization plan, and a copy of that plan. However, notwithstanding the manifest environmental contamination at the Tacoma railyard, *Union Pacific filed no*

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[1] Indeed, the EPA characterized the Tacoma site as one of the ten most hazardous in the country—a characterization widely reported in the local and national media. *See id.* at 25a.

[2] Although Union Pacific officials later denied any knowledge of this study, the District Court specifically found that "this information was available had they sought it out." App. at 43a.

claims against the bankruptcy estate relating to any such contamination.

On November 12, 1985, the District Court entered an order consummating the bankruptcy and discharging all further claims against the bankruptcy trustee, the Milwaukee Road, and the latter's successors and assigns. *See* App. at 70a. The order also enjoined all persons from asserting claims that had been discharged. *See id.* at 73a-74a. The Court expressly retained jurisdiction to enforce that injunction. *See id.* at 71a.

C. The First Round of Litigation

In April 1989, the EPA notified Union Pacific that it was potentially liable for environmental cleanup costs at the Tacoma railyard under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601 *et seq.* ("CERCLA"). App. at 27a. In October 1990, the Washington State Department of Ecology notified Union Pacific that it was also potentially liable for such costs under a state-law analogue to CERCLA, the Washington State Model Toxics Control Act, Wash. Rev. Code §§ 70.105D *et seq.* ("MTCA"), which had been enacted the previous year. *See id.*

On September 9, 1991—nearly two and a half years after receiving the EPA notification—Union Pacific served upon petitioner CMC Heartland Partners ("CMC"), successor in interest to the Milwaukee Road, a letter demanding settlement negotiations regarding liability for the clean-up costs at the Tacoma railyard. Notwithstanding the Milwaukee Road's 1985 bankruptcy discharge, Union Pacific asserted that CMC was liable for environmental clean-up costs at the Tacoma railyard under both CERCLA and the MTCA.

On November 13, 1991, CMC invoked the District Court's retained jurisdiction over the Milwaukee Road bankruptcy by filing a motion to enjoin Union Pacific's claims. Those claims, CMC noted, could and should have been asserted during the

bankruptcy proceeding.[3] The District Court agreed with CMC with respect to the federal CERCLA claims, but disagreed with respect to the state-law MTCA claims. *See* App. at 37a-46a. The Court first held that Union Pacific had at least constructive knowledge of its CERCLA claims before the bar date, and thus was barred thereafter from asserting those claims against CMC. *See id.* at 43a-44a. But the Court then held that Union Pacific had no similar knowledge with respect to its MTCA claims, because the MTCA was not enacted until 1989, four years *after* the claims bar date. *See id.* at 44a-45a.

The Seventh Circuit affirmed in part, vacated in part, and remanded. *See* App. at 19a -34a. The Court first affirmed the District Court's conclusion that Union Pacific's CERCLA claims were barred because Union Pacific had at least constructive knowledge of those claims before the bar date but had not filed a contingent claim against the bankruptcy estate. *See id.* at 28a-33a.[4]

The Seventh Circuit then vacated the District Court's conclusion that Union Pacific's claims under the Washington MTCA were not barred because the statute was not enacted until after the claims bar date. *See id.* at 33a-34a. The relevant inquiry, the Seventh Circuit asserted, was not when the statute was enacted, but whether the type of liability it imposed "existed under predecessor statutes prior to the bar dates, and whether Union Pacific consequently had a contingent claim for environmental cleanup costs under Washington statutes in effect before the bar dates." *Id.* at 34a. Accordingly, the Seventh Circuit remanded for the District Court to determine "what liabilities under the [MTCA] existed [at the time of

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[3] Union Pacific subsequently filed a lawsuit in the district court for the Western District of Washington, seeking a declaratory judgment and contribution and asserting claims under the MTCA and CERCLA. *See* App. at 27a-28a. That action has been stayed pending resolution of this case.

[4] Indeed, the Seventh Circuit noted that "on the basis of the record before it, the [District] [C]ourt could have found actual knowledge as well" as constructive knowledge of the potential CERCLA claims. App. at 31a.

discharge] by virtue of Washington state statutes then in effect." *Id.*

D. The Second Round of Litigation

On remand, the District Court assigned the case to a magistrate judge, who compared the MTCA to three Washington statutes that had existed prior to the bar date: (1) the Water Pollution Control Act, Wash. Rev. Code § 90.48 (1985), (2) the Hazardous Waste Management Act, Wash. Rev. Code § 70.105 (1985), and (3) the nuisance statute, Wash. Rev. Code § 7.48 (1985). The magistrate judge concluded that none of these statutes imposed the same liability as that created by the MTCA. The District Court considered the parties' objections to the magistrate judge's recommended order and, after minor modifications, ratified that order. *See* App. at 47a-64a.

The Seventh Circuit affirmed, holding that the District Court had properly concluded that the liability created by the MTCA was a "new" liability distinct from any liability that existed under Washington law at the time of the bar date in 1985. *See* App. at 9a-17a.[5]

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[5] The Seventh Circuit also noted that, while this litigation was pending, Union Pacific sold the railyard to the Port of Tacoma. Union Pacific sought to substitute the Port as the party prosecuting the case, but the Court of Appeals refused to allow the substitution. *See* App. at 4a.

REASON FOR GRANTING THE WRIT

THE CIRCUITS ARE DIVIDED AS TO THE POINT IN TIME AT WHICH A FEDERAL BANKRUPTCY "CLAIM" BASED ON STATE LAW ARISES.

A. The Federal Bankruptcy Laws Broadly Define "Claims"

As Judge Aldisert noted below, this case presents "the important question" that arises "here and in other judicial circuits" of "whether debtors in bankruptcy who are charged with pollution in the past can be held liable for cleanup costs of hazardous waste at their former business sites." App. at 20a. Resolution of that question implicates the most fundamental principles underlying the federal bankruptcy laws.

Those laws serve two core purposes: (1) to ensure an equitable settlement of debts among a bankrupt's creditors, and (2) thereafter to give the bankrupt a "fresh start" freed from those debts. *See, e.g., Kokoszka v. Belford*, 417 U.S. 642, 645-46 (1974); *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918); *Williams v. United States Fid. & Guar. Co.*, 236 U.S. 549, 554-55 (1915). The bankruptcy laws seek to achieve both these purposes by providing for a comprehensive settlement of the bankrupt's debts followed by a binding discharge of those debts. In order for this procedure to succeed, it is imperative that all debts be settled during the bankruptcy proceeding. Permitting creditors to pursue collection of those debts *after* that proceeding would not only undermine the fairness of the distribution but also jeopardize the bankrupt's ability to make a "fresh start."

Accordingly, the bankruptcy laws require creditors to present all "claims" against a bankrupt during the bankruptcy proceeding or lose those claims forever. *See* 11 U.S.C. §§ 727(b), 1141(d); *see also* former 11 U.S.C. § 35 (repealed 1978). In addition, the bankruptcy laws broadly define the term "claim" to ensure that all conceivable liabilities are presented for orderly resolution during a pending bankruptcy

proceeding. *See, e.g., Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991); *Pennsylvania Dep't of Public Welfare v. Davenport*, 495 U.S. 552, 558 (1990); *Ohio v. Kovacs*, 469 U.S. 274, 279 (1985). A "claim" includes all potential debts, no matter how remote or contingent. *See, e.g., In re Cybermech, Inc.*, 13 F.3d 818, 821 (4th Cir. 1994); *In re Radio-Keith-Orpheum Corp.*, 106 F.2d 22, 22-27 (2d Cir. 1939), *cert. denied*, 308 U.S. 622 (1940).[6] Indeed, the breadth of that term can hardly be overstated. The courts have described it not only as "broad" and "very broad," but as "extremely broad," "could not be broader," "broadest possible," "all-encompassing," and "sufficiently broad to cover any possible obligation." *In re Waterman S.S. Corp.*, 141 B.R. 552, 556 (Bankr. S.D.N.Y. 1992) (internal citations and quotations omitted) (collecting definitions).

B. A Federal Bankruptcy "Claim" Arises at the Time the Relevant Conduct Occurs, Not at the Time State Law Creates Liability Based On Such Conduct.

The acknowledged breadth of the statutory term "claim" informs, but does not directly answer, the question at issue here: *when* does a state-law "claim" arise for purposes of the federal bankruptcy laws? To the extent that Union Pacific's claims against CMC arose *before* the Milwaukee Road's bankruptcy discharge, those claims are barred.

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[6] Because the Milwaukee Road filed for bankruptcy before the enactment of the current Bankruptcy Code in 1978, this case is governed by the Bankruptcy Act of 1898. Both statutes broadly define the term "claim" to include wholly contingent obligations of the sort at issue here. The Seventh Circuit's resolution of this case, accordingly, in no way turned on any perceived distinction between the 1898 and 1978 bankruptcy statutes. *See In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 974 F.2d 775, 781 (7th Cir. 1992) ("Just as Section 77 of the 1898 Act broadly defines claims, the new Bankruptcy Code also broadly defines claims. Compare 11 U.S.C. § 205(b) (repealed 1978) and 11 U.S.C. § 101(4)(A) and (B) (enacted 1978).").

To determine the point in time at which Union Pacific's claim under the Washington MTCA arose, the Seventh Circuit focused on the point in time at which state law created the relevant legal liability. While rejecting the mechanical suggestion that, for purposes of federal bankruptcy law, a "claim" under the MTCA could not arise before the enactment of that statute, *see* App. at 34a, the Court focused the inquiry on the existence of *other* state statutes that imposed the *same* liability, *see id.* Therefore, in the first round of this litigation, the Seventh Circuit remanded the case for the District Court to determine "what liabilities under the [MTCA] existed [at the time of discharge] by virtue of Washington state statutes then in effect." *Id.* The District Court subsequently concluded that no other state statute had imposed that same liability, *see id.* at 56a-64a, and the Seventh Circuit affirmed that conclusion, *see id.* at 9a-17a. Because Union Pacific's MTCA claim did not arise until the enactment of that statute in 1989, the Seventh Circuit held, it could not have been discharged during the 1985 bankruptcy proceeding. *See id.* at 3a, 7a, 9a-10a, 17a.

The Seventh Circuit violated federal law and policy by looking to state law to determine when a "claim" arose for federal bankruptcy purposes. The Seventh Circuit's underlying premise—that a "claim" based on state law cannot arise until state law officially creates the specific liability on which the claim is based—is incorrect. The question of when a federal bankruptcy "claim" arises is a *federal* question to be resolved by reference to the text, structure, and purposes of the federal bankruptcy laws. As at least three other circuits have held, the determination of when a "claim" arises cannot be left to turn on the vagaries of state law. *See, e.g., In re Piper Aircraft Corp.*, 58 F.3d 1573, 1576 & n.2 (11th Cir. 1995); *In re Jensen*, 995 F.2d 925, 929-30 & n.5 (9th Cir. 1993); *Grady v. A.H. Robins Co.*, 839 F.2d 198, 201-02 (4th Cir.), *cert. dismissed*, 487 U.S.

1260 (1988).[7] These circuits, unlike the Seventh Circuit, accordingly recognize that "a claim can exist even though the holder of that claim may have no present cause of action against the debtor" under state law. Arlene E. Mirsky *et al.*, *The Interface Between Bankruptcy and Environmental Laws*, 46 Bus. Law. 623, 652 (1991).

Thus, in determining when a "claim" arises for purposes of the federal bankruptcy laws, "[m]ost courts have focused on the time when the *conduct giving rise to the claim* occurred . . . . With respect to claims under state and federal environmental laws, this usually means the *time at which the contamination or violation occurred.*" *Id.* at 651-52 (emphasis added). The relevant inquiry, in other words, focuses on the underlying conduct at issue rather than the legal consequences or label a state attaches to that conduct. Because "[c]laims in bankruptcy arise from the debtor's conduct," *In re Zelis*, 66 F.3d 205, 209 (9th Cir. 1995) (citing *In re Jensen*, 127 B.R. 27, 32-33 (9th Cir. BAP 1991)), "[a] 'claim' arises at the moment when acts giving rise to the alleged liability are performed." *In re Waterman S.S. Corp.*, 141 B.R. 552, 556 (Bankr. S.D.N.Y. 1992) (internal quotation marks added).[8] *See also In re Johns-*

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[7] Many district courts sitting in bankruptcy have also held that "for federal bankruptcy purposes, a prepetition 'claim' may well encompass a cause of action that, under state law, was not cognizable until after the bankruptcy petition was filed." *In re Johns-Manville Corp.*, 57 B.R. 680, 690 (Bankr. S.D.N.Y. 1986); *see also In re Food Barn Stores, Inc.*, 175 B.R. 723, 728-31 (Bankr. W.D. Mo. 1994); *In re Waterman S.S. Corp.*, 141 B.R. 552, 556 (Bankr. S.D.N.Y. 1992); *In re Black*, 70 B.R. 645, 647-51 (Bankr. D. Utah 1986); *Acevedo v. Van Dorn Plastic Mach. Co.*, 68 B.R. 495, 497-98 (Bankr. E.D.N.Y. 1986); *In re Edge*, 60 B.R. 690, 704-05 (Bankr. M.D. Tenn. 1986); *In re Yanks*, 49 B.R. 56, 57-59 (Bankr. S.D. Fla. 1985); *In re Baldwin-United Corp.*, 48 B.R. 901, 904 (Bankr. S.D. Ohio 1985).

[8] This focus on the underlying conduct is also reflected in the bankruptcy reorganization plan in this case, which barred all post-discharge contribution or indemnity claims "based on *facts* that are unknown, undisclosed and unasserted" as of the bar date. App. at 24a (quoting Plan of Reorganization § 11.2) (emphasis added).

Manville Corp., 57 B.R. 680, 690 (Bankr. S.D.N.Y. 1986); *In re Transp. Sys. Int'l, Inc.*, 110 B.R. 888, 894 (D. Minn. 1990), *aff'd*, 930 F.2d 625 (8th Cir. 1991); *In re Grynberg*, 143 B.R. 574, 576 (Bankr. D. Colo. 1990), *aff'd*, 966 F.2d 570 (10th Cir. 1992). The point at which state law recognizes a cause of action imposing liability for that conduct is immaterial.[9]

That approach is consistent with the broad federal bankruptcy definition of "claim." By holding that a "claim" cannot arise until state law creates the specific liability on which it is based, the Seventh Circuit has opened the door for state law to create "new" post-discharge liabilities based on pre-discharge conduct. The power to impose such liabilities, of course, is the power to undermine the "Uniform Laws on the subject of Bankruptcies throughout the United States" that Congress has enacted pursuant to its express constitutional power. *See* U.S. Const. Art. I, § 2, cl. 4. *Cf. New York v. Feiring*, 313 U.S. 283, 285 (1941) (federal bankrutpcy statute "[i]ntended to be nationwide in its application" and not "controlled or varied by the particular characterization by local law"). By allowing the States to create new "claims" after a federal bankruptcy discharge, the Seventh Circuit has jeopardized the fundamental predictability and stability of the uniform federal bankruptcy laws.[10]

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[9] Indeed, some courts have held that a "claim" arises at the time the debtor engages in the conduct on which the claim is based *even where that conduct does not result in any evident injury until later. See, e.g., Grady v. A.H. Robins Co.*, 839 F.2d 198, 201 (4th Cir.), *cert. dismissed*, 487 U.S. 1260 (1988); *In re Waterman S.S. Corp.*, 141 B.R. 552 (Bankr. S.D.N.Y. 1992); *In re Edge*, 60 B.R. 690, 701-02 (Bankr. M.D. Tenn. 1986). *But see Lemelle v. Universal Mfg. Corp.*, 18 F.3d 1268, 1275-77 (5th Cir. 1994); *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 943 (3d Cir.), *cert.denied*, 474 U.S. 864 (1985).

[10] *See also The Federalist* No. 42, at 271 (James Madison) (Clinton Rossiter ed., 1961) ("The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed

(continued...)

This case offers a compelling example of the danger. Although the Milwaukee Road went into bankruptcy almost *twenty years ago*, and had its debts discharged over *ten years ago*, the Seventh Circuit has now allowed a creditor to file a potentially enormous claim against its successor-in-interest, petitioner CMC Heartland Partners, which has never been involved in the railroad business at all. (Petitioner is in the business of real estate management and development.) The eight-year duration of the Milwaukee Road bankruptcy proceedings (from 1977 to 1985) underscores the careful attention given to discharging the Milwaukee Road's debts in an orderly, equitable, and comprehensive manner. Union Pacific could easily have preserved any and all claims involving environmental contamination at the Tacoma railyard, regardless of the legal basis of liability, by simply filing during the Milwaukee Road bankruptcy proceeding a bare-bones proof of claim parroting the contractual indemnification language in the 1980 purchase agreement. Having failed to do so, Union Pacific should not be allowed to frustrate the "fresh start" provided by the 1985 discharge.

The Seventh Circuit's conclusion that Union Pacific's MTCA claim is not barred, moreover, is especially peculiar in light of the fact that the MTCA is closely modeled on CERCLA. *See* App. at 7a, 10a-11a; *see generally* Comment, *Through the Looking Glass: A Comparison of Covered Persons, Defenses, and Liability under CERCLA and the Washington State Model Toxic Control Act of 1988 (Initiative 97, 1988 General Election)*, 25 Gonz. L. Rev. 253, 254 (1990). What the Seventh Circuit gave with one hand, then, it took away with the other: it allowed Union Pacific to bring under state law the CERCLA claim that it was barred from bringing under federal law. That result makes no sense. Union Pacific clearly knew (or should have known) of the need to file a

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[10] (...continued)
into different States, that the expediency of it seems not likely to be drawn into question.")

contingent claim based on the contamination at the Tacoma railyard during the Milwaukee Road bankruptcy proceedings. A State cannot circumvent the federal bankruptcy laws by simply purporting to attach new, cumulative, or duplicative legal consequences to conduct that occurred before a federal bankruptcy discharge.[11]

C. The Circuits Are Divided As To The Point In Time At Which A Federal Bankruptcy "Claim" Arises.

The Seventh Circuit is not the first circuit to fall into the error of holding that the point at which a federal bankruptcy "claim" arises is to be determined by reference to state law. The Third Circuit has made the same mistake, holding that the point at which a "claim" arises for purposes of the federal bankruptcy laws turns on the point at which a cause of action accrues under state law regardless of when the events underlying the claim occurred. *See In re Frenville Co.*, 744 F.2d 332, 335-36 (3d Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985). That approach, like the Seventh Circuit's approach in this case, "confuse[s] the existence of a present right of action or access to the courts with the existence of a 'claim' for bankruptcy purposes." *In re Edge*, 60 B.R. at 704. The *Frenville* Court's reliance on state law to determine the point at which a federal bankruptcy claim arises has been expressly rejected by three other circuits. *See, e.g., In re Piper Aircraft Corp.*, 58 F.3d 1573, 1576-77 (11th Cir. 1995); *In re Jensen*, 995 F.2d 925, 930 (9th Cir. 1993); *Grady v. A.H. Robins Co.*,

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[11] The same analysis does not necessarily apply where *federal* law purports to impose a new post-discharge liability. Congress, unlike the States, enjoys power to impose new liabilities inconsistent with the federal bankruptcy laws—assuming that such liabilities are not unconstitutionally retroactive. *See, e.g., In re Chateaugay Corp.*, 53 F.3d 478, 497 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995); *In re Penn Central Transp. Co.*, 944 F.2d 164, 168 (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992). Thus, whereas the federal bankruptcy laws must be reconciled with inconsistent federal enactments, those laws trump inconsistent state enactments outright.

839 F.2d 198, 201-02 (4th Cir.), *cert. dismissed*, 487 U.S. 1260 (1988).[12]

The confusion engendered by *Frenville* and exacerbated by the opinions below creates substantial difficulties for the companies considering reorganization and the courts that must assist them. Determining, for example, when environmental claims arise under the bankruptcy laws and thus whether such "claims can be discharged or survive as a liability of the reorganized company can be determinative of whether there can be a successful reorganization." Steven E. Sherman, *Environmental Issues Facing High-Tech Companies In Chapter 11 Proceedings*, in *Computer Law* (Sept. 1994). "Given the importance of this issue and the emerging conflicts among the circuits, it would be surprising if this issue is not soon addressed by the Supreme Court." *Id.*[13]

Both the Third and Seventh Circuits, in sum, have erroneously "replace[d] the federal definition of 'claim' . . .

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[12] Many courts have recognized the split in authority. *See, e.g., In re Fairchild Aircraft Corp.*, 184 B.R. 910, 923 (Bankr. W.D. Tex. 1995) ("*Frenville*'s reliance upon state law has been rightly criticized by other courts as being inconsistent with the intended breadth and scope of the statute and seems to have been rejected in all circuits save its place of origin."); *In re Food Barn Stores, Inc.*, 175 B.R. 723, 730 (Bankr. W.D. Mo. 1994) ("The *Frenville* decision has been criticized or rejected by many courts."); *In re Grynberg*, 143 B.R. 574, 577 (Bankr. D. Colo. 1990) ("[T]he *Frenville* decision has been discredited and is generally not followed outside of the Third Circuit.").

[13] Other commentators and bankruptcy practictioners have also noted the need for clarification of the confusion. *See, e.g.*, Harvey R. Miller *et al.*, *Representing the Secured Creditor In Chapter 11 Cases*, in *Formulation and Confirmation of Chapter 11 Plans Under the Bankruptcy Code* (PLI Com. Law & Practice Course Handbook Series No. A4-4457, 1994); Karynne G. Popper & Alison N. Zirn, *The Bottomless Pit: The Struggle to Achieve Judicial Consistency In the Application of CERCLA In Bankruptcy Proceedings* (PLI Com. Law & Practice Course Handbook Series No. A4-4453, 1994); Case Note, In Re Jensen: *Demonstrating the Need for Supreme Court Resolution of the Conflict Between CERCLA and the Bankruptcy Code*, 9 *J. Land Use & Envtl. L.* 179, 190 (1994).

with the narrower state concept of 'cause of action[.]'" *In re Amfesco Inds., Inc.*, 81 B.R. 777, 782 (Bankr. E.D.N.Y. 1988). The significance of that error cannot be overstated. Those two circuits now allow state law to circumvent federal bankruptcy law at will by creating new liabilities based on pre-discharge conduct.

The resulting parade of horribles is far from speculative: it is manifest in this very case. The Seventh Circuit has allowed the State of Washington, years after the discharge of the Milwaukee Road's debts, to impose on petitioner significant new liability based wholly on pre-discharge events. The federal bankruptcy laws neither authorize nor tolerate that result.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

In the Matter of

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,

Debtor.

CMC HEARTLAND PARTNERS,

Plaintiff-Appellant, Cross-Appellee,

v.

UNION PACIFIC RAILROAD,

Defendant-Appellee, Cross-Appellant.

Nos. 95-1412, 95-2986

Argued Jan. 4, 1996.
Decided Feb. 28, 1996.

Rehearing and Suggestion for Rehearing En Banc Denied April 3, 1996.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, No. 77 B 8999; George W. Lindberg, Judge.

Robert H. Wheeler (argued), Mark Leipold, Oppenheimer, Wolff & Donnelly, Chicago, IL, for Appellant.

Raymond H. Groble, III (argued), Ross & Hardies, Chicago, IL, for Appellee.

Jerold S. Solovy, Jenner & Block, Chicago, IL, for Debtor.

Before ROVNER, DIANE P. WOOD, and EVANS, Circuit Judges.

TERENCE T. EVANS, Circuit Judge.

Like the Energizer Bunny, litigation growing out of the Milwaukee Road's bankruptcy proceedings keeps going and going and going. Today, we issue another opinion—to be added to more than a dozen others—in a case stemming from the reorganization of the railroad which began in 1977.

The Chicago, Milwaukee, St. Paul & Pacific Railroad Company, better known as the Milwaukee Road, came to the end of the line in 1977 when it petitioned for reorganization pursuant to § 77 of the Bankruptcy Act of 1898, formerly 11 U.S.C. § 205 (1976) (repealed 1978). The United States District Court for the Northern District of Illinois served as the reorganization court.

In accordance with procedures under the Bankruptcy Act, the reorganization court established deadlines, or bar dates, for the filing of claims against Milwaukee Road, the estate, and its trustee. The first bar date was September 10, 1985, which established the deadline for all post-petition claims (claims arising against Milwaukee Road during the period of reorganization). Notice of this bar date was sent to all known creditors and published in *The Wall Street Journal*.

On November 12, 1985, the reorganization court entered a consummation order. This order became effective on November 25, 1985, the consummation date. The consummation order set forth a new bar date of December 26, 1985, for claims that arose between the prior September 10 bar date and the November 25 consummation date. This order bars and forever discharges all untimely claims against the trustee, the Milwaukee Road, and its successors and assigns.

The question we face, for the second time, is whether certain claims of the Union Pacific Railroad are among those properly barred by the reorganization court. The claims arise

out of an environmental cleanup of a railyard located within the Commencement Bay/Nearshore Tideflats Superfund site in Tacoma, Washington. Union Pacific purchased the land from the Milwaukee Road in 1980 and, as the owner of the land (at least the owner at the time the appeal was filed but more about that later), faces liability for the cleanup. It filed claims for the cleanup against CMC Heartland Partners, successor-in-interest to the Milwaukee Road, under both the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*, and the Model Toxics Control Act of the State of Washington, Wash.Rev.Code Ch. 70.105D.010 *et seq.*

We first encountered the question in 1993. A brief review of our decision in *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 3 F.3d 200 (7th Cir.1993), will set the stage for our analysis of the present appeal.

We noted that the situation required us to attempt to reconcile conflicting goals of laws that deal with environmental cleanups and those of the bankruptcy code designed to give debtors a "fresh start." In that context we determined that claims subject to the claims bar included "contingent claims." In the context of CERCLA, a contingent claim exists, we said, when a party potentially liable for response costs under the Act can tie a debtor to a "known release of a hazardous substance." At 202. Under that formulation we determined that Union Pacific's CERCLA claim was barred.

However, the Washington state Model Act became effective in 1989, four years after the bar date. We joined other courts, *e.g.*, the Court of Appeals for the Third Circuit—*In re Penn Central Transp. Co.*, 944 F.2d 164 (1991), *cert. den.* 503 U.S. 906 (1992)—in concluding that claims based on a statute enacted after the discharge date are not barred.

That was not the end of the issue. CMC argued that two Washington statutes, the Water Pollution Control Act, Wash.Rev.Code Ch. 90.48, and the Hazardous Waste Management Act, Wash.Rev.Code Ch. 70.105, which existed prior to

the bar date, provided the same or similar relief as the Model Act and thus barred the claim. We remanded the case to the reorganization court for a determination "as to what liabilities under the Model Act existed in 1985 by virtue of Washington state statutes then in effect."

On remand, the district court did an admirably thorough job. Judge George W. Lindberg referred the issue to Magistrate Judge W. Thomas Rosemond, Jr., who compared the Model Act to those two statutes and a third, which CMC added to the mix after remand, the Washington nuisances statute, Wash. Rev.Code Ch. 7.48.140. Judge Rosemond issued a recommendation that the claim not be barred. Judge Lindberg considered objections to the recommendation and, with minor modifications, also concluded that the claim was not barred—that Union Pacific was not subject to the same liability for cleanup of the railyard under prior Washington statutes as it was under the Model Act and, therefore, its claim for contribution from CMC did not exist prior to the enactment of the Model Act. CMC appeals that decision as well as a later decision on its Rule 60 motion in the district court based on newly discovered evidence.

In addition, because Union Pacific sold the land to the Port of Tacoma during the pendency of the appeal, Union Pacific seeks to substitute the Port as the party prosecuting this case. We decline to substitute parties. This appeal will proceed with the original cast. Given the outcome of this appeal and the agreement between Union Pacific and the Port, we find that there is no reason to order substitution.

As to the appeal itself, our standard of review in the many Milwaukee Road cases was set out some time ago: Because the district court's entry of an injunction in this case was both a bankruptcy decision and an interpretation of its prior consummation order, we review the court's decision to bar [the creditor's] claims for abuse of discretion. Nonetheless, in applying the abuse of discretion standard, we do not give equal deference to every aspect of a court's decision. The

abuse of discretion standard is used to evaluate the reorganization court's application of the facts to the appropriate legal standard, and the factual findings and legal conclusions underlying such decisions are evaluated under the clearly erroneous and de novo standards, respectively. *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 974 F.2d 775, 779-80 (7th Cir., 1992). The decision on the Rule 60 motion is subject to considerably more deference. It is reviewed for an abuse of discretion.

The railyard in Tacoma was owned and used by the Milwaukee Road from the early years of this century. In 1980, Union Pacific, with the authorization of the reorganization court, purchased the Tacoma site from the trustee and later assigned it to a wholly owned subsidiary, the Oregon-Washington Railroad and Navigation Co. The purchase agreement contained an indemnification clause for claims arising out of the operation of the property prior to March 12, 1980.

After purchasing the site, Union Pacific removed existing structures and let the land stand vacant. In 1980, Union Pacific's own inspection of the property revealed that the area of the site used for diesel fueling was saturated with oil which, along with contaminated dirt, would probably have to be removed.

The railyard is in a highly industrial area. In October 1981, the United States Environmental Protection Agency placed the area on the Agency's National Priority List. The Superfund site was described as one of the ten most hazardous sites in the country. In 1982 the State of Washington commissioned an environmental study of the railyard, and the EPA investigated the site in 1985.

Union Pacific also owned other property within the Superfund site and had dealings with the EPA in connection with two of them. One was an abandoned railway tunnel. The EPA notified Union Pacific in 1982 that it was a potentially responsible party for the cleanup of that site. Later, however,

the EPA determined that the tunnel was not the source of contamination and discontinued its investigation.

The other site was Union Pacific's Tacoma fueling facility. The Department of Ecology of the State of Washington investigated oil contamination in the City of Tacoma waterway in 1982 and, under Washington's Water Pollution Control Act, directed Union Pacific to take remedial action. Union Pacific commissioned a groundwater investigation. Although the investigation revealed no groundwater contamination, Union Pacific, with state approval, removed the top foot of soil at the facility.

Then in 1990, Union Pacific decided to sell the railyard and, in preparation for the sale, commissioned an environmental audit. The audit, completed in June 1990 by a company called Applied Geotechnology, found subsurface contamination of the soil by petroleum hydrocarbons. The audit also identified potential contamination from metals and solvents. As required by law, Union Pacific notified both the EPA and the State of Washington of these findings.

The State notified Union Pacific that it was potentially liable for cleanup of the site under the Model Act. The EPA notified the company that it was also a potentially responsible party under CERCLA. Union Pacific and the State entered into an agreement for remediation of contamination at the railyard.

It was then, on September 9, 1991, that Union Pacific served CMC with a demand for settlement negotiations regarding the cleanup. CMC filed a motion in the reorganization court to enjoin Union Pacific, under the consummation order, from asserting any claims arising out of the cleanup of the railyard. Union Pacific filed a complaint in the Western District of Washington for contribution under CERCLA and the Model Act.

This summary brings us to the issue at hand. Should the claim under the Washington Model Act be barred? We have previously noted that Union Pacific's CERCLA claim is

barred. In fact, in 1996, as we look back at the situation, it seems surprising, if not shocking, that Union Pacific did not file a contingent CERCLA claim. Also from our 1996 vantage point, it is perhaps less surprising, but nevertheless worthy of notice, that Union Pacific did not file a contingent claim under any possibly relevant existing state statute.

But questions regarding whether the existence of claims under prior statutes bars a claim now under the Model Act can only be fairly answered by viewing the world from a 1985 perspective, not from our perspective in 1996. We must resist the temptation to use 20-20 hindsight.

What was the 1985 perspective? It can best be understood by a brief glance at the history of CERCLA, which is, after all, the inspiration for Washington's Model Toxics Control Act. CERCLA is the source of our current understanding that owners *as owners* can be responsible for cleanup costs.

CERCLA became effective on December 11, 1980, ten months after Union Pacific purchased the railyard. Tremendous changes in environmental law have occurred in the 15 years since the passage of the Act. One commentator has said that with one possible exception, CERCLA "stands alone as a conspicuous example of legislative consequence outdistancing even the boldest imagination of its sponsors."[1] He points out that looking back in 1985, Congress could believe that CERCLA was aimed at a relatively limited problem and that cleanup was a relatively inexpensive affair involving scraping off some soil.[2]

And, in fact, CERCLA was a sleeper at first. It was widely thought to be a short-range law; it had a self-destruct provision of September 30, 1985. Prior to reauthorization in 1986, it had accomplished long-term total cleanup of only 14

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[1] William H. Rodgers, Jr., *Environmental Law*, at 685 (2d ed. 1994).

[2] *Id.*

sites.[3] Furthermore, the political climate was not conducive to bold environmental initiatives. The EPA administrator appointed in 1981 was reluctant to use the full authority provided by the Act. She and other top administrators wanted to limit the program to five years, and they minimized the extent of hazardous waste problems.[4]

With the full power of CERCLA not yet fully understood or acknowledged, it was unlikely that states would assume that their existing, traditional environmental statutes could provide the kind of relief that CERCLA would eventually be seen to provide. In fact, states were unsure of what their powers were. On March 10, 1986, four months after the bar date in this case, the Supreme Court struck down a New Jersey state cleanup tax law on the grounds that CERCLA preempted that particular type of state action. *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986). In 1986, Congress repealed the section on which the Court relied, and it is now, as we stated in our prior decision in this case, quite clear that CERCLA does not preempt state action. *See also Burlington Northern R.R. v. Time Oil Co.*, 738 F.Supp. 1339 (W.D.Wash.1990).

The expansion of the influence of CERCLA came primarily as a result of the 1986 reauthorization bill, the Superfund Amendments and Reauthorization Act of 1986 (SARA). A look at a few things SARA added to the law will show what was missing in the original bill. SARA expanded the types of costs which could be recovered from responsible parties. These now include virtually every conceivable expense, including health assessments and health effects studies, and interest from the date that payment is demanded. See § 9607(a)(4)(D). It provided specifically for actions for contribution. See § 9613(f). It dealt with the unanswered

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[3] *Superfund II: A New Mandate*, Environment Reporter, Vol. 17, No. 42 (Feb. 13, 1987), at 3.

[4] Environment Reporter, at 10.

question as to how clean is clean. It provided for explicit cleanup standards, stating that remedial actions which permanently reduce toxics are to be preferred over remedial actions which do not involve permanent reduction. See § 9621(b). Significantly for the present case, SARA also gave the states the right to substantial and meaningful involvement in cleanup efforts. § 9621(f).

Early case law also shows the way courts were feeling their way toward the strong CERCLA that now exists. In 1983, courts were struggling with the causation issue. In *United States v. Wade*, 577 F.Supp. 1326 (E.D.Pa.1983), the court considered whether the Act required traditional proof that a defendant caused the harm. Only after much discussion did the court determine that the Act imposed liability on certain persons, without proof that their specific waste caused the necessity for a cleanup. As late as 1985, in *State of New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir.1985), the court was still considering arguments that CERCLA applied only to the entity which was the owner of the property at the time of the discharge and that there must be a showing of causation. The court ultimately rejected both contentions, holding that CERCLA "unequivocally imposes strict liability on the current owner of a facility from which there is a release or threat of release, without regard to causation." At 1044. The court stated a proposition used as a starting point today, but it was not always so.

Given this historical context in 1985, did Union Pacific have a contingent claim, based on the three existing Washington statutes, which would bar its claim based on Washington's 1989 Model Act? Today, CMC asks us to interpret the statutes creatively to say that Union Pacific would have known in 1985 that it, as owner, might have been held responsible for allowing seepage, identifiable as from the railyard, that anyone would know must have gotten into the ground water and that therefore it could be ordered to remediate the site permanently. Was such an interpretation of the Washington statutes within the realm of possibility in 1985,

or would Union Pacific have been considered almost frivolous for filing with the bankruptcy court a claim for contribution based on such potential liability? For that matter, is such an interpretation possible today?

We have reviewed de novo the conclusions of the district court regarding these issues and conclude that the court was correct. The Washington statutes did not provide the comprehensive liability or remedy found in the Model Act.

The Washington Model Act was the result of a statewide initiative. The bill, which became effective on March 1, 1989, as we said, is modeled after CERCLA/SARA but in some ways seems even clearer. For instance, CERCLA lists covered persons as the "owner and operator" of a hazardous waste site. That phrase prompted litigation in which arguments were made regarding whether to be a covered person one had to be both an owner and an operator or whether "and" actually meant "or" in that context. *See, e.g., United States v. Maryland Bank & Trust Co.*, 632 F.Supp. 573 (D.Md.1986). The Model Act stated clearly that covered persons included the "owner or operator." § 70.105D.040(1)(a). With narrow exceptions, the Model Act imposes strict liability on an owner of property based merely on ownership without regard to what actions the owner took on the property to cause pollution. The owner of the site is a person potentially responsible for the cleanup, whether or not it caused the pollution. The Act also recognizes the difficulty of identifying with precision the parties responsible for hazardous waste sites, and thus it permits joint and several liability. § 70.105D.010 (4).

The Washington statutes existing in 1985, which we will soon discuss, often impose liability—sometimes strict liability—on the owner of a property. However, strict liability attaches based on an owner's activities at the site. The statutes are grounded in a traditional version of strict liability; that is, strict liability as a theory of recovery based on the idea that a defendant *engaged in some kind of activity* which exposed

others to a risk of harm and that the activity justified allocating the risk to the defendant, even though he acted with reasonable care—that is, it is not necessary to prove negligence. See Prosser & Keeton, *The Law of Torts* 653 (1984).

Liability under the existing statutes would require difficult matters of proof. Union Pacific took some actions at the site—removing structures, etc. Looking back, CMC urges us to say that the Department of Ecology could have attempted to prove that Union Pacific's actions—taken arguably to clean up the site—actually disrupted the land and caused pollution. Being realistic, we have to recognize how highly unlikely that is. Furthermore, the proof of harm would involve showing that the petroleum hydrocarbons from the railyard did, in fact, seep into the waters of the state. It is easy to look back and say, "Well, of course, they must have," but such speculation does not proof make. A remote possibility of liability under the existing statutes should not bar a claim under the Model Act.

In addition, enforcement provisions of the Model Act are like those in CERCLA, not those that traditionally existed. The Model Act has as its purpose the protection of each person's "fundamental and inalienable right to a healthful environment." § 70.105D.010(1). To ensure that cleanup is accomplished, it, like CERCLA, has strong enforcement provisions. After determining that "remedial action is in the public interest" the state can "issue orders requiring potentially liable persons to provide the remedial action." Refusal to conduct the cleanup can result in draconian penalties. A person who claims to have been improperly required to take remedial action must take the action first and contest the order with the department or in court later. See § 70.105D.050. The Model Act is, like CERCLA, a statute under which—as we pointed out in another Milwaukee Road case—persons needlessly told to clean up may recover costs only after they have done so: "In the meantime they must get the lead out"—or the petroleum hydrocarbons. *In re CMC Heartland Partners*, 966 F.2d 1143, 1148 (7th Cir.1992).

Having made our generalizations, we turn to a discussion of the individual Washington statutes.

The Water Pollution Control Act, Wash.Rev.Code § 90.48.080, provides: **Discharge of polluting matter in waters prohibited**. It shall be unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of the commission, as provided for in this chapter. CMC argued in the district court, as it does here, that the Water Pollution Control Act (WPCA) is a strict liability statute which could apply in this case because the pollutants on the railyard likely "seep" into the waters of the state. The district court properly rejected the notion that this statute provided a contingent claim which would bar a claim based on the Model Act.

CMC seeks comfort in a 1992 decision of the Washington Pollution Control Hearings Board which held that the WPCA imposes strict liability and, in fact, that liability may be imposed on the landowner. *Nordevan v. State of Washington, Dep't of Ecology*, 1992 WL 172977 (1992). Unfortunately for CMC, a look at the facts in *Nordevan* shows how different that situation is from that at the railyard.

Nordevan is a company which buys, clears, and prepares land for sale to developers. The land in question was on a steep slope with a creek running through it. *Nordevan* obtained various permits and began clearing the land. And, of course, as the board specifically found, it rains a lot in Washington. There were clear, obvious, and serious erosion problems which muddied the creek. The sophistication required to establish this violation is far less than would be necessary to establish the pollution of groundwater from the Union Pacific site. In imposing liability on Nordevan, the board stated that the Water Pollution Control Act was a strict

liability statute. Nordevan had "drained, suffered or caused the discharges into the waters of the state" and was therefore strictly liable.

Further, Nordevan had allowed a utility company a limited utility easement. In what CMC argues is an imposition of liability on an owner *as owner*, the board said that Nordevan, as the owner of the property, "remained responsible for the discharge of potential pollution." We disagree with CMC's interpretation.

The manner in which liability attached to the owner in *Nordevan* is similar to the liability on the owner in *Sea Farms, Inc. v. Foster & Marshall Realty, Inc.*, 42 Wash.App. 308, 711 P.2d 1049 (1985). There the court considered oyster beds "negligently damaged by the construction of a marina...." Sea Farms sued both the developer and the project engineer of the marina. The owner of the land attempted to pass off its liability onto the general contractor. That it was not permitted to do. The duty to comply with the permit which had been issued to the owner to build the marina was nondelegable. The owner's motion for summary judgment was denied because it had a duty not to pollute its own waters, as well as those of others: "Thus the duty to refrain from acts which will pollute waters on another's land may not be delegated to an independent contractor." At 312, 711 P.2d 1049.

In both *Sea Farms* and *Nordevan*, the owner is responsible for pollution done on its land by those acting with its knowledge and permission. It is a far cry from Union Pacific being held liable for pollution caused by the Milwaukee Road during a half century before Union Pacific bought the land.

In addition, although the WPCA prohibits permitting any polluting matter to seep into the waters, and although it would perhaps be possible to show that the pollutants from the railyard have seeped into the groundwater, the proof required to sustain that claim as to the railyard could be formidable. The statute would seem to require that one prove that the

pollutants which exist in the groundwater—or any other water—came from the railyard. The railyard is located in an area of bountiful sources of pollutants. The proof on this point would be considerably more than what is required under the Model Act.

Finally, after defying the orders of the Department of Ecology to control the erosion, Nordevan was fined $15,000, with $5,000 of that amount suspended on the condition that it not violate the law for two years. In short, Union Pacific did not face the same threat of liability and thus did not possess the same claim for contribution under the WPCA as it did once the Model Act went into effect.

The Washington Hazardous Waste Management Act, Wash.Rev.Code § 70.105.050, is even less helpful to CMC. It provides that: No person shall dispose of designated extremely hazardous wastes at any disposal site in the state other than the disposal site established and approved for such purpose under provisions of this chapter, except when such wastes are going to a processing facility which will result in the waste being reclaimed, treated, detoxified, neutralized, or otherwise processed to remove its harmful properties or characteristics. "Dispose or disposal" is defined as "the discarding or abandoning of hazardous wastes or the treatment, decontamination, or recycling of such wastes once they have been discarded or abandoned." § 70.105.010(4). It is not necessary to say much more about a potential Union Pacific claim under this statute than that the district court was right to reject the argument that one might have existed.

The statute refers clearly to those who dispose of waste at disposal sites, not to those who own land on which wastes were allowed to gather by a previous owner. Union Pacific would not have had occasion to be concerned about a potential claim under this statute. CMC does not provide us with any cases in which liability has been established in similar circumstances.

Finally, we turn to Washington's nuisance statute. The statute is not a model of efficiency. Several sections of the Act could conceivably be argued to be applicable to this case. Section 7.48.010 defines actionable nuisances: The obstruction of any highway or the closing of the channel of any stream used for boating or rafting logs, lumber or timber, or whatever is injurious to health or indecent or offensive to the senses, or an obstruction in the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance and the subject of an action for damages and other and further relief.

Section 7.48.120 defines nuisance: Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or highway; or in any way renders other persons insecure in life, or in the use of property. Then § 7.48.130 defines public nuisance: A public nuisance is one which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal. Section 7.48.150 says everything in 7.48.130 is a private nuisance. If all that was not enough, § 7.48.140 enumerates public nuisances. Subsection (2) is the one argued to be relevant: To throw or deposit any offal or other offensive matter, or the carcass of any dead animal, in any watercourse, stream, lake, pond, spring, well, or common sewer, street, or public highway, or in any manner to corrupt or render unwholesome or impure the water of any such spring, stream, pond, lake, or well, to the injury or prejudice of others[.] The statute provides for abatement of the nuisance. See § 7.48.250.

What seems clear from a simple reading of the statutes is that parlaying a claim based on those statutes into something approaching that arising from the Model Act would be more than an uphill battle.

In 1985, the Supreme Court of Washington discussed a private nuisance action on certification from the District Court for the Western District of Washington. The discussion sheds light on the nature of a nuisance action. A nuisance action required a "substantial and unreasonable interference with [the] use and enjoyment of" one's property. *Bradley v. American Smelting and Refining Co.*, 104 Wash.2d 677, 709 P.2d 782 (1985). We could not say with confidence that Washington courts would interpret that requirement sufficiently broadly to allow a claim regarding the railyard. It is, as we have noted, located in a highly industrial area, identified as a Superfund site. The railyard could hardly affect the rights of the "neighborhood." See § 7.48.130. Union Pacific could as easily have a claim against other property owners within the site. And while the entire site could be alleged to affect the rights of the "entire community" (*id.*), it would be hard to single out Union Pacific and would be a formidable challenge to sue all of the property owners within the site.

CMC calls our attention to *Miotke v. City of Spokane*, 101 Wash.2d 307, 678 P.2d 803 (1984), which involved a determination that a violation of the WPCA can support a claim for nuisance. Of course, before there can be a nuisance under this theory, there must be a finding of a violation of the WPCA, which we have just discussed as it relates to this case. In *Miotke*, the city, in violation of a waste discharge permit, discharged 100 million gallons of raw sewage into a river, which was at a relatively low flow. The sewage went downstream to a lake on which several persons had constructed lake homes. The lake became a putrid mess. It is true—and not surprising—that a claim for nuisance was found to exist on these facts. Even so, the court noted that the litigation was "protracted and complex." 678 P.2d at 806. How much more difficult would it be to show a violation in the present case?

Furthermore, because of the railyard's location, there are many other sources of pollution. In order to obtain relief from Union Pacific under a nuisance theory, the state would be required to identify pollution which could be traced to Union

Pacific. *See Maas v. Perkins*, 42 Wash.2d 38, 253 P.2d 427 (1953); *Smith v. Rodene*, 69 Wash.2d 482, 418 P.2d 741 (1966). That is different in kind from a showing that there is hazardous waste on property of which the defendant is the owner.

CMC urges us to superimpose the Model Act on the nuisance statute and find that the nuisance statute provides some of the relief set out in the Model Act. As a practical matter, it does not. For all these reasons, we conclude that the district court correctly determined that Washington statutes existing in 1985 did not form the basis for the filing, by Union Pacific, of a contingent claim in the Milwaukee Road bankruptcy proceeding.

CMC also has appealed the denial of its Rule 60 motion in which it claimed that new evidence required relief from the judgment.

CMC is entitled to relief from the district court's final judgment only if it can present "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Federal Rule of Civil Procedure 60(b)(2). In order to prevail on its motion, CMC must meet the following prerequisites: 1. The evidence was discovered following trial; 2. Due diligence on the part of the movant to discover the new evidence is shown or may be inferred; 3. The evidence is not merely cumulative or impeaching; 4. The evidence is material; and 5. The evidence is such that a new trial would probably produce a new result. If any of these prerequisites are not met, CMC cannot prevail on its motion.

The denial of a Rule 60(b)(2) motion will not be overturned unless the district court abused its discretion. *McKnight v. United States Steel Corp.*, 726 F.2d 333, 335 (7th Cir.1984). To establish an abuse of discretion, CMC must show that no reasonable person could agree with the court; if reasonable persons could disagree as to the propriety of the

court's action there is no abuse of discretion. *Lee v. Village of River Forest*, 936 F.2d 976 (7th Cir.1991).

The newly discovered evidence was a November 1994 feasibility study regarding environmental cleanup of the site; a November 1994 letter from the Washington State Department of Ecology to the Port allegedly indicating that the department could direct a cleanup of the site under prior statutes; the sale agreement between Union Pacific and the Port of Tacoma, in which the Port agrees to indemnify Union Pacific from claims under any environmental laws; and an excerpt from an April 1993 hydrogeologic characterization report prepared by a Union Pacific subsidiary.

Conveniently, the newly discovered documents allegedly showed that contrary to the district court's ruling, affirmative acts on Union Pacific's part were not required before cleanup liability attached, and even if they were, Union Pacific had engaged in such acts. It was not an abuse of discretion for the court to find that this evidence was not new or, to the extent it was new, that it was not material and would not have changed the underlying decision. We agree with the district court and furthermore find that the newly discovered evidence would not have changed the analysis in our de novo review of the underlying decision.

The decisions of the district court are AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

In the Matter of

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,

Debtor.

CMC HEARTLAND PARTNERS,

Plaintiff-Appellant, Cross-Appellee,

v.

UNION PACIFIC RAILROAD,

Defendant-Appellee, Cross-Appellant.

Nos. 92-3713, 92-3790.

June 8, 1993.

Decided Aug. 18, 1993.

Raymond H. Groble, III (argued), Ross & Hardies, Chicago, IL, for Union Pacific R. Co.

Michael D. Dabertin, Robert Wheeler (argued), Oppenheimer, Wolff & Donnelly, Chicago, IL, for CMC Heartland Partners.

James M. Amend, Kirkland & Ellis, Chicago, Michael L. Gesas, Gesas, Pilati & Gesas, Chicago, IL, for Chicago, Milwaukee, St. Paul and Pacific R. Co.

Before COFFEY and MANION, Circuit Judges, and ALDISERT, Senior Circuit Judge.*

ALDISERT, Senior Circuit Judge.

We attempt again to reconcile the conflicting goals of environmental cleanup and a "fresh start" for bankruptcy debtors.

Presented in these cases, here and in other judicial circuits, is the important question whether debtors in bankruptcy who are charged with pollution in the past can be held liable for cleanup costs of hazardous waste at their former business sites.[1] Generally, demands for contribution and reimbursement are made after bankruptcy proceedings are either in advanced stages or have been completed; in these cases the debtors generally assert that the demands are too late because they were made subsequent to bar dates for claims fixed by the bankruptcy courts.

The interface of environmental cleanup laws and federal bankruptcy statutes is never tidy; jurisprudentially, it is somewhat grubby. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 ("CERCLA") and similar state laws, like Washington's Model Toxics Control Act, Wash.Rev.Code ch.

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* Ruggero J. Aldisert, of the Third Circuit, sitting by designation.

[1] *See In re Jensen*, 995 F.2d 925 (9th Cir.1993); *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir.1991); *In re National Gypsum Co.*, 139 B.R. 397 (N.D.Tex.1992); *United States v. Union Scrap & Metal*, 123 B.R. 831 (D.Minn.1990); *In re Edge*, 60 B.R. 690 (Bankr.M.D.Tenn.1986).

70.105D ("the Model Act"), effective March 1, 1989, and predecessor statutes seek to protect public health and the environment by facilitating the cleanup of environmental contamination and imposing costs on the parties responsible for the pollution. The Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-1330, and its predecessors were designed to give a debtor a fresh start by discharging as many of its debts as possible. The tension between these fundamental aspects of our national policy is profound.

The Supreme Court has indicated that, if possible, these two conflicting objectives should be reconciled. *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 505-06 (1986); *see Ohio v. Kovacs*, 469 U.S. 274, 280-82 (1985); *see also In re National Gypsum Co.*, 139 B.R. 397, 404 (N.D.Tex.1992) ("It is not a question of which statute should be accorded primacy over the other, but rather what interaction between the two statutes serves most faithfully the policy objectives embodied in the two separate enactments of Congress"). The very difficult issue present in cases involving this fundamental conflict—including the case before us—is: When does a "claim" as defined by the Bankruptcy Act for recovery of cleanup costs arise?

I.

The bankruptcy petition in this case was filed under the Bankruptcy Act of 1898. Section 77(b) of that act, former 11 U.S.C. § 205(b) (repealed 1978), provided: "The term 'claims' includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character." *See City of New York v. New York, N.H. & H. R.R.*, 344 U.S. 293, 295 n. 4 (1953). The current version of the code sets out the broad reach of the term in greater detail. "Claim" means:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured,

> or unsecured; or (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(5).

When a kindred contention was previously before us in *In re Chicago, Milwaukee, St. Paul & Pacific Railroad*, 974 F.2d 775 (7th Cir.1992) (hereinafter *Chicago I*), we announced a possible formulation of when a contingent claim arose:

> [W]hen a potential CERCLA claimant can tie the bankruptcy debtor to a known release of a hazardous substance which the potential claimant knows will lead to CERCLA response costs, and when this potential claimant has, in fact, conducted tests with regard to this contamination problem, then this potential claimant has, at least, a contingent CERCLA claim under Section 77.

Id. at 786. Our formulation has been cited with approval by the Court of Appeals for the Ninth Circuit. *In re Jensen*, 995 F.2d 925 (9th Cir.1993).

We have cross appeals filed by Union Pacific Railroad and by CMC Heartland Partners, the successor in interest to the debtor, Chicago, Milwaukee, St. Paul & Pacific Railroad (hereinafter "the Milwaukee Road"). Our task is to determine whether the district court properly applied our definition of a contingent claim to that submitted by Union Pacific Railroad for contribution and indemnity. Union Pacific purchased the property at issue from the Milwaukee Road bankruptcy trustee by agreement dated March 28, 1980. The agreement included a clause by which the bankruptcy trustee and the Milwaukee Road agreed to indemnify Union Pacific and its subsidiaries—

against any and all claims, damages, liabilities, losses or demands whatsoever, and expenses in connection therewith, including reasonable fees of outside counsel, regardless of the source or nature thereof, arising out of the operation of the Properties prior to March 12, 1980. App. at 49.

Union Pacific now faces liability under state and federal law for cleanup of pollution on the property and seeks to enforce the indemnification clause against CMC. CMC responds that any claims for cleanup costs were discharged in the bankruptcy proceedings.

In these cross appeals, we must consider (1) whether the district court was correct in holding that Union Pacific's claim for indemnification of its liability under federal law arose before the discharge and thus was barred; and (2) whether the district court was correct in holding that Union Pacific's claim for indemnification of its liability under state law arose after the discharge and thus was not barred.

Jurisdiction was proper in the trial court based on 28 U.S.C. § 1334. This court has jurisdiction under 28 U.S.C. § 1291. The appeal was timely filed under Rule 4(a) of the Federal Rules of Appellate Procedure.

We hold that the district court properly held that Union Pacific's claim under CERCLA was barred. To the extent that the district court further held that Union Pacific's claim under the Washington Model Toxic Control Act was not barred, we vacate that portion of the judgment and remand with a direction that the district court first determine what liabilities under the Model Act, if any, were imposed under previous Washington statutes, and then decide what, if any, specific cleanup liabilities under previous state statutes were discharged because no claims were timely presented to the bankruptcy court.

II.

The Milwaukee Road petitioned for reorganization on December 19, 1977, under Section 77 of the Bankruptcy Act of

1898, which was then in effect. Union Pacific was a creditor and participated in the bankruptcy proceedings.

On July 12, 1985, the district court entered Order No. 832, which confirmed the debtor's reorganization plan. The order set a bar date of September 10, 1985, for all post-petition claims. Claims arising after September 10 but before the consummation date of November 25, 1985, were required to be filed by December 26, 1985. Under Section 11.2 of the plan, the bar dates apply to—all claims, including claims for contribution and indemnity existing as of the Confirmation Date [July 12, 1985] and Consummation Date [November 25, 1985], respectively. The bar dates provided in section 11.1, however, do not apply to claims for contribution or indemnity based on facts that are unknown, undisclosed and unasserted as of the Confirmation Date and Consummation Date, respectively. App. at 23. The court subsequently entered Order No. 866 on November 12, 1985 ("the consummation order"), which discharged all claims against the Milwaukee Road and its successors and assigns, including CMC, unless those claims had been timely filed. The order also enjoined all persons from asserting claims that had been discharged.

The property giving rise to Union Pacific's claim is a former railyard in Tacoma, Washington ("the railyard"), which had been owned by the Milwaukee Road from the early years of this century. The railyard is located within the Commencement Bay/Nearshore Tideflats Superfund site in Tacoma, Washington ("the Superfund site"), a site whose characterization, remediation and funding were described in numerous national and regional newspapers as early as 1981. The bankruptcy trustee conveyed it to Union Pacific by quitclaim deed, and it was subsequently assigned to the Oregon-Washington Railroad and Navigation Co., a wholly owned subsidiary of Union Pacific. The transfer was authorized by the reorganization court and took place on December 19, 1980.

Union Pacific removed the existing structures on the railyard, and it thereafter stood vacant. By April 1980, Union

Pacific engineers had inspected the site and reported their results in an internal memorandum to Roland Haacke, the company's district engineer. The memorandum included this statement: Diesel fueling area is oil saturated and will probably require removal of surface oil as well as contaminated dirt. Apparently, this covers quite a large area and may require extensive clean-up. Rec. 4, Ex. J-1. Haacke testified that he made several personal inspections of the railyard and observed oil or grease on the ground in the shop area, the roundhouse area and the diesel fueling area. Union Pacific contends that the inspections by Haacke and others gave no indication of any subsurface contamination but revealed only surface contamination.

Meanwhile, hazardous wastes in the area around the railyard came to the attention of the Environmental Protection Agency. EPA placed Commencement Bay and the Nearshore Tideflats on the Interim Priority List in October 1981. In this same highly publicized announcement, EPA described the Superfund site as one of the ten most hazardous sites in the country. Local and national media reported these developments. Rec. 3, Ex. H; *see also Wallace Turner, Tacoma Pollution on "10 Worst" List*, N.Y. Times, Nov. 8, 1981, § 1, at 35. The Union Pacific railyard is entirely within the Superfund site. The proposed inclusion of the Commencement Bay/Nearshore Tideflats area on the first National Priorities List (NPL) was published in the Federal Register. Amendment to National Oil and Hazardous Substance Contingency Plan; The Nation Priorities List, 47 Fed.Reg. 58476 (1982) (proposed Dec. 30, 1982). The site eventually was included on the first NPL, which was issued in September 1983.

The state of Washington commissioned an environmental study of the railyard, focusing on its historical use. The study, by Dames & Moore, was completed in January 1982 and included these findings: During the history of the railyard, many spills of compounds occurred on site, including oil and other compounds transported by rail. Spills were not cleaned up, and the materials were allowed to seep into the ground. The

railroad also cleaned out their rail cars. It was reported that during the late 1950s the material was dumped on site and allowed to disperse into the soil and seep into the waterways. In 1960, the railroad was required to collect copper sulfite and other toxic materials dry and dispose of them on land. Runoff from this site enters the Milwaukee Waterway. This evaluation of the site indicates that the soils at this site are possibly permeated with toxic compounds. Recently, there has been some grading and the tracks were pulled up. This may have resulted in covering the permeated soils with a thin layer of dirt or exposing the contaminated soils to the environment. Rec. 4, Ex. G, at 50. The Dames & Moore study was delivered to the Washington Department of Ecology. Union Pacific states that it did not receive a copy of the study and was not aware of its contents.

Union Pacific owned other property within the Superfund site and had dealings with EPA and the state in connection with two of these properties. EPA found contamination in the vicinity of an abandoned railway tunnel owned by Union Pacific and notified Union Pacific in early 1982 that it was a potentially responsible party. However, EPA determined that the tunnel was not the source of the contamination and discontinued its investigations. Union Pacific interpreted this to mean that it would not be required to participate in the cleanup of the Superfund site.

The state's ecology department also contacted Union Pacific about oil contamination that occurred in the City of Tacoma waterway on February 16, 1982. The source of the spill was determined to be Union Pacific's Tacoma fueling facility, located several miles from the railyard with which the present case is concerned. Under the state's Water Pollution Control Act, Union Pacific was required to take remedial action and then commissioned a groundwater investigation. Although the investigation revealed no groundwater contamination, Union Pacific proposed to remove the top one-foot of soil at the facility to "eliminate the possibility of any diesel fuel

in such soil reaching the storm drains or groundwater." The soil was removed, and the state approved this action.

Finally, in August 1985, several months before the bar dates, EPA completed a Remedial Investigation of the Superfund site. This investigation contained a reference to environmental contamination at the railyard: Milwaukee Railroad was located on the south shore of Sitcum Waterway until 1980. According to Dames & Moore (1982), numerous solid and liquid spills have occurred in this area. The contents of these spills are unknown and the associated potential for release of contaminants to Sitcum Waterway from the spills and railway operations cannot be evaluated. Union Pacific Br. at 10.

Union Pacific later decided to sell the railyard and commissioned an environmental audit that was completed by Applied Geotechnology on June 29, 1990, and disclosed subsurface contamination consisting primarily of petroleum hydrocarbons. The audit also identified potential contamination from metals and solvents. Union Pacific notified both EPA and the state of these findings but contends that it did not know of any subsurface contamination prior to this environmental audit.

The state ecology department notified Union Pacific on October 16, 1990, that the railroad was potentially liable under the Washington Model Act. Union Pacific and the state then entered into an agreement on July 31, 1990, providing for remediation of contamination at the railyard under the act. CMC asserts also that on April 24, 1989, EPA notified Union Pacific that it was a potentially responsible party under CERCLA and thus could be liable for cleanup costs at the railyard.

Union Pacific served CMC on September 9, 1991, with a demand for settlement negotiations concerning cleanup of the railyard. CMC filed a motion in the district court for the Northern District of Illinois to enjoin Union Pacific, pursuant to the consummation order, from asserting any claims arising out of the purchase of the railyard. Union Pacific subsequently

filed a complaint in the district court for the Western District of Washington, seeking declaratory judgment and contribution and asserting claims under the Model Act and CERCLA.

III.

After reviewing the facts, the district court for the Northern District of Illinois considered whether Union Pacific knew of its potential liability under CERCLA and the Model Act before September 10, 1985, the bar date for post-petition claims. *In re Chicago, M., St. P. & Pac. R.R.*, No. 77 B 8999, 1992 WL 316321 (N.D.Ill. Oct. 21, 1992) (hereinafter "D.Ct.Op."). The court concluded that Union Pacific had constructive knowledge of its CERCLA claim by the bar date and identified several facts that supported its determination: The Commencement Bay and Nearshore Tideflats area was identified in 1981 as one of the most contaminated places in the country. D.Ct.Op. at 7. The railyard is included in this area. Union Pacific officials denied that they knew of the 1982 Dames & Moore report, but "this information was available had they sought it out." *Id.* EPA's notice to Union Pacific in 1982 concerning possible contamination from the railway tunnel "was direct notice to Union Pacific that there were environmental investigations occurring in the Commencement Bay Area." *Id.* Union Pacific knew in 1982 of spills at its Tacoma fueling facility, which made the railroad liable for cleanup costs under state law. *Id.* Union Pacific's own engineers had inspected the railyard in 1980 and noted that the site "may require extensive cleanup." *Id.* at 8. The court stated: While Union Pacific may not have had actual knowledge of hazardous waste contamination at the railyard, the facts reveal there was enough information present at the time that the bar dates went into effect that Union Pacific should have been aware of its potential liability. . . . The presence of a number of environmental investigations by state and federal authorities in the Commencement Bay area should have reasonably alerted Union Pacific to the possibility of environmental contamination of an area that was already found to be oil saturated. Enough factual information exists to give Union Pacific constructive

knowledge of a CERCLA claim at the time of the bar dates. *Id.* at 7, 8.

The district court then turned to Union Pacific's claim for indemnity of costs relating to the Model Act and held that this claim was not barred. The court noted that the consummation order was filed in 1985, before the Model Act took effect on March 1, 1989. The court concluded, "Union Pacific could not possibly have known of its liability under a statute that was not in existence until four years after the bar dates were established for filing claims against the Milwaukee Road." *Id.* at 9 (citing *In re Penn Central Transp. Co.*, 944 F.2d 164, 167-68 (3d Cir.1991) (CERCLA claim was not discharged in bankruptcy when consummation order was entered before CERCLA was enacted), *cert. denied sub nom. Penn Central Corp. v. United States*, ___ U.S. ___, 112 S.Ct. 1262 (1992)). The court also rejected CMC's implicit argument that CERCLA preempted state law remedies for hazardous waste contamination. *Id.* at 8.

IV.

Union Pacific argues that the district court erred in determining that Union Pacific had constructive knowledge of its CERCLA liability before the consummation date. CMC argues that the district court erred in determining that Union Pacific could not have known of its state law liabilities until after the consummation order was filed; it asserts that the Model Act did not create new duties but merely recodified existing duties under the state's Water Pollution Control Act, Wash.Rev.Code ch. 90.48, and Hazardous Waste Management Act, Wash.Rev.Code ch. 70.105, and accompanying regulations, Wash.Admin.Code ch. 173-303.

We described the standard of review in *Chicago I*: Because the district court's entry of an injunction in this case was both a bankruptcy decision and an interpretation of its prior consummation order, we review the court's decision to bar [the creditor's] claims for abuse of discretion. Nonetheless, in applying the abuse of discretion standard, we do not give

equal deference to every aspect of a court's decision. The abuse of discretion standard is used to evaluate the reorganization court's application of the facts to the appropriate legal standard, and the factual findings and legal conclusions underlying such decisions are evaluated under the clearly erroneous and *de novo* standards, respectively. 974 F.2d at 779-80.

V.

Our analysis must begin with the definition of a "claim" under the Bankruptcy Act of 1898. We have recognized that Section 77(b) of the Act "broadly defines claims to include 'debts, whether liquidated or unliquidated ... or other interests of whatever character.'" *Chicago I*, 974 F.2d at 780 (quoting former 11 U.S.C. § 205(b) (repealed 1978)).

Union Pacific argues that it did not have sufficient knowledge of its CERCLA liability prior to the consummation date to require it to file a proof of claim. In *Chicago I*, the Washington State Department of Transportation (WSDOT) purchased property from the bankruptcy trustee in 1984. The state's Department of Ecology determined by June or July 1985 that the site was contaminated as a result of a 1979 derailment and spill of copper ore. In August 1985, the Department of Ecology notified WSDOT of the problem and indicated that some tests had been completed and further testing would be necessary. Soil samples were taken in October 1985, and test results were returned in November.

WSDOT did not file a proof of claim before the second bar date of December 26, 1985. The state subsequently sought to recover cleanup costs incurred under CERCLA. The district court held that the claim was barred, and we affirmed.

As previously set forth in detail in Part III, the district court in the present case listed five significant facts indicating that Union Pacific had sufficient knowledge of its potential liability under CERCLA to require it to file a proof of claim. In summary, the court found that the railyard was included in a Superfund site; the Dames & Moore report described contam-

ination at the railyard, a report described by the district court as information that was available to Union Pacific "had they sought it out"; Union Pacific knew of EPA investigations in the area; it knew of its liability under state law for contamination at the Tacoma fueling facility; and its own engineers had noted that the railyard might require extensive cleanup. The court held that Union Pacific had constructive knowledge of its CERCLA claim.

Union Pacific presents a number of counterarguments that essentially challenge the district court's factual finding of constructive knowledge. It argues that it did not anticipate CERCLA liability because petroleum is specifically exempted from coverage. 42 U.S.C. § 9601(14) ("The term ['hazardous substance'] does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance. . . ."). *But see* 50 Fed. Reg. 13,460 (April 4, 1985) (commentary to final rulemaking) ("EPA does not consider materials such as waste oil to which listed CERCLA substances have been added to be within the petroleum exclusion.").

Although the district court determined that "Union Pacific may not have had actual knowledge of hazardous waste containers at the railyard," on the basis of the record before it, the court could have found actual knowledge as well. The April 1, 1980 in-house engineers' memorandum, prepared shortly after the purchase agreement was entered into, stated that a portion of the railyard "will probably require removal of surface oil as well as contaminated dirt. Apparently, this covers quite a large area and may require extensive clean-up." Although at oral argument, Union Pacific explained that this memorandum "pertained solely to surface spills," its district engineer had testified to seeing "oil on the surface, grease or oil, fuel" on the site. One does not need an engineering degree to conclude that grease, oil and fuel left standing for a long period of time have the capacity to seep into the subsurface of soil. This was *five years* before the bar date.

In any event, the district court did not err in finding constructive knowledge. With EPA conducting a massive investigation of one of the ten most hazardous sites in the country, in which the railyard was located, Union Pacific cannot now argue that it did not know of potential environmental claims regarding the railyard. Our national environmental policy does not permit a commercial landowner in a tainted area to put on blinders or attempt an "ostrich defense."

We are satisfied that the district court's determination that Union Pacific had constructive knowledge of the facts summarized above was not clearly erroneous. From this we conclude that when such knowledge was imputed to Union Pacific, it became "a potential CERCLA claimant [who could] tie the bankruptcy debtor to a known release of a hazardous substance." *Chicago I*, 974 F.2d at 786. We also conclude that on the basis of the Dames & Moore study, the April 1980 inspection of the railyard by Union Pacific engineers, the personal inspections by district engineer Haacke, the public characterization by the EPA of the Commencement Bay area as one of the ten most hazardous sites in the country and other evidence, it can be said, paraphrasing *Chicago I*, that Union Pacific was a potential claimant that had, in fact, made inspections of the site and observed contamination and had available similar information from other sources, and therefore Union Pacific had at least a contingent CERCLA claim under Section 77. *See id.* We conclude further that Union Pacific had this contingent CERCLA claim substantially in advance of the bankruptcy court's bar dates of September 10, 1985 and December 26, 1985.

We hold, therefore, that the district court did not abuse its discretion to bar Union Pacific's CERCLA claims.

In so deciding, we are not pursuing "mechanical juris prudence" in the sense condemned by Roscoe Pound[2] by requiring fealty to bar dates set by bankruptcy judges. We are not vaunting the national bankruptcy policy over environmental concerns. If anything, we are acknowledging the importance of facilitating the cleanup of environmental contamination by placing upon property owners—whether longtime owners or new purchasers—the obligation of performing an environmental audit as early as possible. It is not too much to require a timely examination under any circumstances, but where a present owner expects reimbursement from a predecessor in interest, any delay may preclude relief, because of the intervention of a statute of limitations, or as here, the interposition of dates barring claims imposed by bankruptcy courts.

VI.

We now turn to CMC's appeal challenging the district court's determination that Union Pacific's claim under the Model Toxics Control Act was not barred, because the Model Act did not go into effect until after the 1985 bar dates. CMC acknowledges that the Model Act went into effect after the bar dates and that several courts have held that claims based on a statute enacted after discharge in bankruptcy are not barred. *E.g., Penn Central*, 944 F.2d at 168. CMC distinguishes these cases by asserting, "Union Pacific was aware of existing liabilities to the United States and the State of Washington for clean-up of the Railyard Site, under both CERCLA and existing Washington State statutes." CMC Br. at 24. CMC relies on the state Water Pollution Control Act, Wash.Rev.Code ch. 90.48, and on the Hazardous Waste Management Act, Wash.Rev.Code ch. 70.105, with its accompanying regulations, Wash.Admin.Code. ch. 173-303. These enactments were in effect in 1985, prior to the adoption of the Model Act. Union Pacific vigorously argues that it had

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[2] Roscoe Pound, Mechanical Jurisprudence, 8 Colum.L.Rev. 605 (1908), reprinted in part in Ruggero J. Aldisert, The Judicial Process 304 (1976).

no liability under the laws existing in 1985 and that the Model Act imposed an entirely new species of liability.

We will not meet the question at this time as to what liabilities under the Model Act existed in 1985 by virtue of Washington state statutes then in effect. The district court did not make findings in this respect, and we will remand these proceedings to that court to make this determination in the first instance.

It is suggested that upon remand the parties assist the court by preparing a section-by-section comparison of the Model Act with previously enacted relevant state statutes. Such an analysis could indicate whether a particular type of liability under the Model Act existed under predecessor statutes prior to the bar dates, and whether Union Pacific consequently had a contingent claim for environmental cleanup costs under Washington statutes in effect before the bar dates.

The judgment of the district court is AFFIRMED in part and VACATED in part and the cause REMANDED for further proceedings in accordance with the foregoing.

APPENDIX C

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

April 3, 1996

Before

Hon. Ilana Diamond Rovner, *Circuit Judge*
Hon. Diane P. Wood, *Circuit Judge*
Hon. Terence T. Evans, *Circuit Judge*

Nos. 95-1412 & 95-2986

In the Matter of:

CHICAGO, MILWAUKEE, ST. PAUL &
PACIFIC RAILROAD COMPANY,
Debtor.

CMC HEARTLAND PARTNERS,
Plaintiff-Appellant,

v.

UNION PACIFIC RAILROAD,
Defendant-Appellee.

ORDER

On March 13, 1996, CMC Heartland Partners filed a petition for rehearing with suggestion for rehearing en banc. All the judges on the original panel have voted to deny the petition, and none of the active judges have requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

APPENDIX D

UNITED STATES DISTRICT COURT
N. D. ILLINOIS, EASTERN DIVISION

In the Matter of

CHICAGO, MILWAUKEE, ST. PAUL &
PACIFIC RAILROAD COMPANY,

Debtor.

No. 77 B 8999.

MEMORANDUM AND ORDER

LINDBERG, District Judge.

This case arises out of the sale in bankruptcy of a railyard in the State of Washington. The purchaser, Union Pacific Railroad Co. ("Union Pacific"), commenced suit in the U.S. District Court for the Western District of Washington against the reorganized corporation, CMC Heartland Partners ("CMC"), for clean-up and response costs incurred under the Comprehensive Environmental Response Compensation and Liability Act, 42 USC §§ 9601 et seq. ("CERCLA") and the Washington Model Toxic Control Act, RCW 70.105D.010 —70.105D.921 ("MTCA"), and for indemnification under the terms of the sale agreement. CMC has moved to enjoin Union Pacific from prosecuting its claims. The court determines that Union Pacific is enjoined from bringing any CERCLA claim

against CMC with respect to the railyard site. This court will not enjoin Union Pacific from bringing any potential claims under the MTCA.

FACTS

On December 19, 1977, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company ("Milwaukee Road") petitioned for reorganization pursuant to section 77 of the Bankruptcy Act of 1898, formerly 11 USC § 205. This court served as the reorganization court throughout the reorganization proceedings. In accordance with section 77 of the Bankruptcy Act and Bankruptcy Rule 8-401, the reorganization court established bar dates for the filing of claims against Milwaukee Road, the Estate and its trustee. Order No. 832 provided that all post-petition claims, that is, claims arising against or obligations incurred by Milwaukee Road during the reorganization proceedings, were to be filed on or before September 10, 1985. Order No. 832 also confirmed the Trustee's Modified 1985 Plan of Reorganization that defined the kinds of claims to which the bar dates apply. Order No. 866, the Consummation Order, which was entered by the reorganization court on November 12, 1985 and which became effective on November 25, 1985, barred and discharged all claims against the Trustee, the Debtor, and its assigns and successors including CMC, except as provided for in the bankruptcy plan. Order No. 866 also enjoined all persons from attempting to prosecute or assert claims that had been discharged in the bankruptcy proceeding. This court retained jurisdiction to enforce that injunction.

Union Pacific actively participated in the Milwaukee Road reorganization proceedings and had actual notice of the bar dates. Several Union Pacific officers and legal counsel were on the official service list for the reorganization. Counsel for Union Pacific also participated in the reorganization approval plan process.

In March 1980, Union Pacific purchased approximately 100 miles of railroad right-of-way and various railyard

properties in Washington and Idaho from the Trustee in Bankruptcy of Milwaukee Road. One of these railyards was the former Milwaukee Road yard in Tacoma, Washington. As part of the purchase agreement Union Pacific bargained for and received indemnification from the trustee as follows:

> The Trustee and the Milwaukee Road agree to indemnify and save harmless Union Pacific, its lessors subsidiaries and/or affiliates and their respective officers, agents and employees, against any and all claims, damages, liabilities, lawsuits or demands whatsoever, and expenses in connection therewith, including reasonable fees of outside counsel, regardless of the source or nature thereof, arising out of the operations of the properties prior to March 12, 1980; or arising out of the ownership of the properties at anytime, or the operation or use thereof, by the Milwaukee Road after March 12, 1980, and prior to the date of Closing. . . .
>
> This covenant of indemnity shall remain in full force notwithstanding the consummation of the transactions contemplated in this Agreement.

On October 21, 1981, the Environmental Protection Agency ("EPA") published its National Priorities List ("NPL") which indicated that the Commencement Bay/Nearshore Tideflats ("Commencement Bay") area, which encompassed the railyard site, was one of the ten worst hazardous waste sites in the country. This listing was published in the Federal Register on December 30, 1982. The events surrounding the listing and remediation of the site were subsequently discussed in numerous national and regional newspapers. See "EPA Names 115 Worst Toxic Waste Dump Sites in U.S.," the *Washington Post § 1*, pg. A4, October 24, 1981; "Tacoma Pollution in Top 10," *Seattle Post-Intelligencer*, October 24, 1981. The Department of Ecology ("DOE") contracted with a private company, Dames & Moore, to study aspects of the

contamination of the Commencement Bay area. In January of 1982, Dames & Moore published its "Historic Land Use Survey of the Tacoma Tide Flats," in which it identified 117 historical sources of contamination in the Sitcum Waterway, including the railyard site. The Dames & Moore study describes the history of the railyard site:

> During the history of the railyard, many spills of compounds occurred on site, including oil and other compounds transported by rail. Spills were not cleaned up, and the materials were allowed to seep into the ground.
>
> The railroad also cleaned out their rail cars. It was reported that during the late 1950's the material was dumped on site and allowed to disperse into the soil and seep in the waterways. In 1960, the railroad was required to collect copper sulfite and other toxic materials dry and dispose of them on land. Runoff from this site enters the Milwaukee Waterway. This evaluation of the site indicates that the soils at this site are possibly permeated with toxic compounds. Recently, there has been some grading and the tracks were pulled up. This may have resulted in covering the permeated soils with a thin layer of dirt or exposing the contaminated soils to the environment.

In September 1983, the EPA published its first official National Priorities List ("NPL") of 406 hazardous waste sites throughout the country. Included on that list was the Commencement Bay site. In October 1984, the DOE listed the railyard site in its "Monthly Status Report, Commencement Bay Cleanup Sites" for suspected soil and groundwater contamination for past spills.

In August 1985, the DOE and EPA issued a Remedial Investigation (RI). The RI, which relied in part on the Dames

& Moore information, noted that numerous solid and liquid spills had occurred in the area.

Union Pacific's own fueling facilities in Tacoma were investigated by the DOE in 1982. As a result of this investigation, Union Pacific agreed to remove the top level of oil-contaminated soil at the facility to prevent groundwater contamination. Union Pacific was also in direct contact with the EPA concerning potential environmental contamination at an abandoned railroad tunnel.

As the result of a title dispute with the Puyallup Native American Tribe, the railyard stood vacant. Union Pacific's only action with regard to the railyard was to remove the existing structures and clean up the surface of the yard. During the time that the railyard stood vacant, some of Union Pacific's employees became aware of contamination of portions of the railyard's surface by petroleum wastes. In an internal memorandum, a Union Pacific division engineer noted that:

> Diesel fueling area is oil saturated and will probably require removal of surface oil as well as contaminated dirt. Apparently, this covers quite a large area and may require extensive clean-up.

The Engineering Department at Union Pacific was responsible for inspection and for environmental cleanup, either performing the work in house or hiring a private contractor.

In preparation for the sale of the railyard, Union Pacific commissioned an environmental audit of the site. The audit was completed by Applied Geotechnology on June 29, 1990. The audit discovered subsurface contamination consisting primarily of petroleum hydrocarbons but also identified potential contamination from metals and solvents as well. Union Pacific, as required by law, notified the DOE and the EPA of the results of this assessment.

Based on this information, the DOE notified Union Pacific on October 16, 1990 that it was a Potentially Liable

Party ("PLP") with respect to environmental contamination of the railyard. On July 31, 1991, Union Pacific entered into an agreement with the DOE for remediation of the railyard under the provisions of the Washington Model Toxic Control Act ("MTCA").

In a letter dated September 9, 1991, Union Pacific requested CMC, the reorganized Milwaukee Road corporation, to enter into settlement negotiations with Union Pacific concerning the clean-up and response costs to be incurred. CMC responded to the letter by filing this action and requesting the court to enforce the consummation order and enjoin Union Pacific from prosecuting any claims against CMC arising out of Union Pacific's purchase of the railyard. CMC asserts that these claims were not brought before the bar date and were therefore discharged in the reorganization. Not long after CMC filed its motion in this court, Union Pacific filed a complaint against CMC in the U.S. District Court for the Western District of Washington asserting declaratory judgment, CERCLA, MTCA and contribution claims.

DISCUSSION

Order No. 866 of the reorganization court includes a provision which enjoins all "Entities" from prosecuting, pursuing or attempting to institute any suit, action or proceeding against CMC by reason of any obligations incurred by the Debtor of the Trustee except the obligations imposed upon or required to be assumed by CMC by the reorganization plan. This court must now determine whether Union Pacific's claims were required to be assumed by CMC by the reorganization plan. Section 11.2 of the reorganization plan bars all claims "including claims for contribution or indemnity existing as of the Confirmation Date and the Consummation Date, respectively. The bar dates provided in section 11.1, however, do not apply to claims for contribution or indemnity based on facts that are unknown, undisclosed or unasserted as of the Confirmation Date and Consummation Date respectively."

Union Pacific does not deny its involvement in the reorganization proceedings, nor does it deny that it had actual notice of the Confirmation and Consummation Dates. Union Pacific contends, however, that its potential CERCLA claim was unknown at the time of the reorganization proceedings and that, because the MTCA was enacted in 1989, claims arising from this statute were unknowable before the 1985 bar dates. Union Pacific claims that it is entitled to indemnity and contribution because its claims fall under the above-mentioned exception to the bankruptcy bars in section 11.2 of the reorganization plan.

While Union Pacific may not have had actual knowledge of hazardous waste contamination at the railyard, the facts reveal there was enough information present at the time that the bar dates went into effect that Union Pacific should have been aware of its potential liability. The Commencement Bay area, which included the railyard, was listed nationally in the Federal Register as one of the most contaminated areas in America. In addition to this, numerous national and regional newspapers ran stories about hazardous waste contamination at the Commencement Bay area. The railyard was listed as a potential source of environmental contamination in the 1982 Dames & Moore study and in the 1985 DOE Remedial Investigation. While Union Pacific denies that it was aware of either the Dames & Moore study or the Remedial Investigation, this information was available had they sought it out.

In 1982, Union Pacific was informed by the EPA of its potential CERCLA liability for contamination at an old railroad tunnel that it owned in the Commencement Bay area. While this investigation showed no hazardous release from the tunnel, this was direct notice to Union Pacific that there were environmental investigations occurring in the Commencement Bay area.

Union Pacific also knew of an environmental investigation for spills at its own nearby fueling facilities in Tacoma.

As a result of the investigation into their Tacoma railyard by the DOE, Union Pacific agreed to remove the top layer of soil on that facility. Union Pacific argues that because the investigation at this facility did not show any groundwater contamination it may give rise to the inference that such would be the case at the similar Milwaukee Road railyard site. This is a very naive and dangerous inference.

At the railyard site itself, Union Pacific workers noticed oil wastes present on the surface and concluded that because of this contamination, the site "may require extensive clean-up." Union Pacific did, in fact, remove the existing structures on the land and cleaned the surface of the site.

The presence of a number of environmental investigations by state and federal authorities in the Commencement Bay area should have reasonably alerted Union Pacific to the possibility of environmental contamination of an area that was already found to be oil saturated. Enough factual information exists to give Union Pacific constructive knowledge of a CERCLA claim at the time of the bar dates. Knowledge of CERCLA liability before the consummation date bars Union Pacific from asserting any claims under CERCLA against CMC. See *In the Matter of: Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, No. 91-2172 slip op. (7th Cir. Aug. 18, 1992).

Union Pacific's MTCA claim, however, is not barred by the bankruptcy reorganization. CMC argues that since Union Pacific could have brought a CERCLA claim before the bar dates and did not, it should be barred from bringing a similar state law claim although the state statute was not in effect at the time of the reorganization. CMC cites no law in support of its argument. CMC seems to be implicitly arguing CERCLA preemption of Union Pacific's state law claims. More precisely, CMC wants this court to rule that a contingent CERCLA claim preempts a state law claim that has yet to come into existence. CERCLA, however, is very clear that States can enact and enforce statutes that provide additional liability

or requirements with respect to the release of hazardous substances within such state, and that these laws are independent of CERCLA to the extent that they do not allow for double compensation for removal costs or damages. 42 USC §§ 9614(a), 9614(b).

The MTCA had not been enacted by the State of Washington at the time the consummation order was entered. Union Pacific could not possibly have known of its liability under a statute that was not in existence until four years after the bar dates were established for filing claims against the Milwaukee Road. See *In the Matter of Penn Central Transportation Co.*, 944 F.2d 164 (3d Cir. 1991) (CERCLA claim was not discharged in bankruptcy when the consummation order was entered before CERCLA was enacted). Even though the MTCA claim may be similar to the barred CERCLA claim, CMC cites no authority to support barring Union Pacific from prosecuting this claim.

CMC also asserts that a settlement agreement entered into by both Union Pacific and CMC in 1991 releases it from its liability to Union Pacific. The settlement agreement deals primarily with the partitioning of land involved in a claim filed by Union Pacific. The agreement contains the following broad language which is the basis for CMC's argument:

> CMC and UP release and discharge each other from any and all claims raised, or which could have been raised, against each other arising out of the matters, transactions, occurrences or events involved in the Litigation or in the Reorganization Proceedings;

It does not appear that either party had any intention of including potential but unasserted environmental claims when it negotiated this settlement. By its own terms, the settlement agreement is governed by Washington law, which provides that the intent of the contracting parties should be determined by looking at the contract as a whole. *Stender v. Twin City Foods, Inc.*, 510 P.2d 221 (1973). The agreement provides that the

parties intended to settle only claims and counter-claims that had been asserted in litigation in the State of Washington and in the reorganization proceedings in this court. Union Pacific's MTCA claims, which were unasserted at the time of the settlement and had nothing to do with the partitioning of the land, are not released by that agreement.

ORDERED: Pursuant to Order No. 866 of this court, Union Pacific is enjoined from asserting or attempting to prosecute any claims under 42 USC §§ 9601- 9675, (CERCLA) for indemnity or contribution against CMC. Union Pacific is not enjoined from pursuing its claims for indemnity or contribution under the Washington Model Toxic Control Act, RCW 70.105D.010—70.105D.921 (MTCA).

George W. Lindberg
United States District Judge

Date: October 21, 1992

APPENDIX E

UNITED STATES DISTRICT COURT
N. D. ILLINOIS, EASTERN DIVISION

In the Matter of

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,

Debtor.

No. 77 B 8999.

MEMORANDUM OPINION AND ORDER

Before the court is the magistrate judge's Report and Recommendation ("R & R") on CMC Heartland Partners' ("CMC") "Renewed Motion to Enjoin Union Pacific's State Law Claims for Remediation."[1] In the R & R, Magistrate Judge Rosemond recommends that the court deny CMC's renewed motion. CMC has filed objections to the R & R; Union Pacific has filed a reply to CMC's objections.

CMC's objections to the R & R can be grouped into three categories. First, CMC argues that, in reaching the conclusions in the R & R, the magistrate judge mistakenly assumed facts not in the record. Second, CMC maintains that the magistrate judge misapplied the Seventh Circuit's standard pertaining to the definition of a "claim" for the purposes of section 77 of the Bankruptcy Act of 1898. Finally, CMC contends that the magistrate judge improperly interpreted Washington state law.

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[1] For a summary of the facts and procedural history of this case leading up to this motion, see *In the Matter of Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 3 F.3d 200 (7th Cir.1993) ("*Chicago III*").

For the reasons that follow, the court overrules CMC's objections to the R & R, and with minor exceptions, adopts the R & R. CMC's renewed motion is denied.

I.

CMC first objects that "[i]n several critical areas, the Magistrate has assumed facts not in the record and then relied upon those facts and inferences therefrom in making his recommendations." CMC Objections ("Objections") at 3.

The first error in this regard, according to CMC, is the magistrate judge's statement that CMC had been charged with pollution in the past. Specifically, the magistrate judge stated:

> Involved in this case was the important question of whether debtors in bankruptcy who were charged with pollution in the past could be liable for clean-up costs of hazardous waste at their former business sites.

R & R at 1. CMC maintains that neither it nor its predecessor, the Milwaukee Road, was ever charged with any pollution activity at the railyard in the past. On the contrary, according to CMC, *"[a]ll of the enforcement activity referenced in the record occurred after Union Pacific acquired ownership"* of the railyard. Objections at 4 (CMC's emphasis). Thus, CMC argues, the magistrate judge incorrectly assumed that this was a case in which CMC had been charged with pollution and was trying to beat those charges by relying on the bar dates.

Union Pacific maintains that CMC takes the magistrate judge's words out of context and ascribes to them a meaning that the magistrate judge never intended. According to Union Pacific, the "charge" to which the magistrate judge referred was not any regulatory action; rather CMC was "charged" with pollution by Union Pacific in its claim for indemnity on the basis that CMC's predecessor contaminated the railyard. Reply at 4-5.

The court agrees with Union Pacific. *Aside from the* above-quoted passage, there is nothing in the R & R that suggests that the magistrate judge believed that CMC had been charged by an official agency with pollution in the past at the railyard. Indeed, it appears that the magistrate judge was simply framing the issue in much the same way as the Seventh Circuit had done in a prior appeal of this case. See *Chicago III*, 3 F.3d at 201 ("Presented in these cases, here and in other judicial circuits, is the important question whether debtors in bankruptcy who are charged with pollution in the past can be held liable for cleanup costs of hazardous waste at their former business sites.").

Second, CMC argues that the magistrate judge confused the railyard with Union Pacific's fueling facility in Tacoma. CMC bases this argument on the magistrate judge's statement that in 1982 Union Pacific "removed some surface soil from the property." R & R at 3. CMC claims there is no evidence that Union Pacific ever removed any soil from the railyard. Objections at 5. Union Pacific argues that the magistrate judge's statement is supported by the record, citing the deposition of Roland Haacke at pages 41-42 and 49-51, and the report of Applied Geotechnology, Inc. Reply at 4-5.

The court's review of these parts of the record reveals no support for the magistrate judge's statement.[2] CMC argues that the magistrate judge made this misstatement because he confused the railyard with Union Pacific's fueling facility, where soil was indeed removed in 1983. A more plausible explanation is that the magistrate judge relied on Union Pacific's representation in its brief that it removed some soil from the railyard. See Reply Br. at 4. Although Union Pacific has failed to provide any record support for the

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[2] In his deposition, Mr. Haacke specifically denied knowing whether any soil was removed from the railyard. As for the report of Applied Geotechnology, Inc., Union Pacific fails to cite to a particular place in the report which supports the magistrate judge's statement. Moreover, the court's review of the sixty plus page report revealed no such support.

proposition that it removed soil from the railyard in 1982, the court does not believe that the magistrate judge confused the railyard with the fueling facility. Nor does the court believe that CMC has adequately explained why this one unsupported statement of fact dooms the entire R & R. Except as to that statement, the court overrules CMC's objections to the factual recitation in the R & R.

II.

CMC's second objection to the R & R concerns the standard for determining whether a party has a "claim" within the meaning of section 77 of the Bankruptcy Act of 1898. The fundamental issue facing the magistrate judge was whether Union Pacific had a "claim" for indemnification (within the meaning of section 77) that should have been brought before the bar dates. The magistrate judge decided that Union Pacific did not have such a claim and hence should not be enjoined from bringing such a claim now.

According to CMC, the magistrate judge used too stringent a test for determining what a "claim" is under section 77. CMC maintains that the magistrate judge erred in assuming that such a claim had to be established with a high degree of certainty. CMC contends that "[t]he proper section 77 test is whether Union Pacific had a contingent claim for contribution, based on the *possible liability* that Union Pacific could have faced under state law." Objections at 7.

Union Pacific takes the position that the magistrate judge correctly applied section 77. Union Pacific points to the following language in *Chicago III* where the Seventh Circuit discusses when a CERCLA claim arises: When a potential CERCLA claimant can tie the bankruptcy debtor to a known release of a hazardous substance which the potential claimant knows will lead to CERCLA response costs, and when this potential claimant has, in fact, conducted tests with regard to this contamination problem, then this potential claimant has, at least, a contingent CERCLA claim under

Section 77. *Chicago III*, 3 F.3d at 202. Adapting this formulation to the issue before the court, Union Pacific suggests that the court should deem a claim to arise under a state environmental statute when the claimant has knowledge of the release of a hazardous substance which the claimant knows will lead to response costs under that statute. Reply at 6.

The proper test for determining whether a claim has arisen under section 77 is a crucial issue on which the parties have offered little helpful authority.[3] The court does not believe that the passage from *Chicago III* relied on by Union Pacific is a proper source from which to cull a standard in this case. As this court interprets that passage, the Seventh Circuit was stating that, under circumstances such as those prevailing in *Chicago III*, a claim arises under section 77 *without question*. The court did *not* appear to be saying that *only* under similarly compelling circumstances would a claim arise.

CMC relies on *Chicago III* and *In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 974 F.2d 775 (7th Cir.1992) ("*Chicago I*") as support for its view that Union Pacific had to file a proof of claim before the bar dates as long as it had a "contingent claim" for indemnification. CMC does not elaborate on the meaning of the term "contingent claim." It is "usually said to refer to obligations that will become due upon the happening of a future event that was 'within the actual or presumed contemplation of the parties at the time the original relationship between the parties was created.'" *In re Chateaugay Corp.*, 944 F.2d 997, 1004 (2d Cir.1991) (discussing meaning of the term in context of the new Bankruptcy

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[3] Even the statutory definition of the term "claims" offers no real assistance due to its highly general nature. Section 77 provides that "[t]he term claims includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character."

Code). For the purposes of this case, the "original relationship between the parties" was created when Union Pacific bought the railyard from CMC's predecessor. Therefore, the question is presumably whether, at the time of the purchase, an obligation to clean up the contamination at the railyard would arise on the happening of some future event that was within the actual or presumed contemplation of the parties. The difficulty in attempting to answer this question is that the statute upon which Union Pacific bases its indemnification claim was not in effect until *after* the bar dates.

As the Seventh Circuit has noted, "the determination of when a party has a claim or contingent claim seems to hinge on the nature of the claim and the posture of the case." *Chicago I*, 974 F.2d at 781. This observation is especially appropriate in this case, given that Union Pacific's claim is based on a statute enacted after the bar dates and that the Seventh Circuit has given a general indication of how to proceed on remand. Therefore, it is appropriate to review certain facts of this case as well as the procedural history leading up to CMC's renewed motion.

Union Pacific purchased the railyard from the Milwaukee Road in 1980. Included in the purchase agreement was the indemnity clause under which Union Pacific now seeks to collect contribution from CMC for remediation costs at the railyard. In 1985, this court entered orders barring all claims against the Milwaukee Road and its successor and assigns, including CMC, that had not been timely filed. In 1989, the State of Washington's Model Toxics Control Act, Wash. Rev.Code ch. 70.105D ("the Model Act"), took effect. Union Pacific decided to sell the railyard and commissioned an audit. The audit was completed in June 1990, and revealed that the railyard was contaminated with hazardous substances. Union Pacific duly notified the State of Washington of those findings. In October 1990, the Washington Department of Ecology ("DOE") notified Union Pacific that it was potentially liable under the Model Act. In July 1991, Union Pacific agreed to clean up the contamina-

tion at the railyard. Union Pacific then filed suit in the Western District of Washington seeking contribution from CMC for clean-up costs pursuant to the indemnity provision in the purchase agreement for the railyard.

CMC filed a motion with this court (which had retained jurisdiction to enforce the discharge order) to enjoin Union Pacific from prosecuting its claims under both CERCLA and the Model Act. This court enjoined Union Pacific from seeking contribution for any claims arising out of CERCLA, but declined to enjoin Union Pacific from seeking contribution for any claims arising out of the Model Act. On appeal, the Seventh Circuit affirmed this court's ruling with respect to CERCLA, but it vacated and remanded this court's ruling with respect to the Model Act. With respect to the latter, the court of appeals stated:

> We now turn to CMC's appeal challenging the district court's determination that Union Pacific's claim under [the Model Act] was not barred because the Model Act did not go into effect until after the 1985 bar dates. CMC acknowledges that the Model Act went into effect after the bar dates and that several courts have held that claims based on a statute enacted after the discharge in bankruptcy are not barred. *E.g., Penn Central,* 944 F.2d at 168. CMC distinguishes these cases by asserting, "Union Pacific was aware of existing liabilities to the United States and the State of Washington for clean-up of the Railyard Site, under both CERCLA and existing Washington State statutes." CMC Br. at 24. CMC relies on the state Water Pollution Control Act, Wash.Rev. Code ch. 98.48, and on the Hazardous Waste Management Act, Wash. Rev.Code ch. 70.105, with its accompanying regulations, Wash. Admin.Code ch. 173-303. These enactments were in effect prior to the

> adoption of the Model Act. Union Pacific vigorously argues that it had no liability under the laws existing in 1985 and that the Model Act imposed an entirely new species of liability.
>
> We will not meet the question at this time as to what liabilities under the Model Act existed in 1985 by virtue of Washington state statutes then in effect. The district court did not make findings in this respect, and we will remand these proceedings to that court to make this determination in the first instance.
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> It is suggested that upon remand the parties assist the court by preparing a section-by-section comparison of the Model Act with previously enacted relevant state statutes. Such an analysis could indicate whether a particular type of liability under the Model Act existed under predecessor statutes prior to the bar dates, and whether Union Pacific consequently had a contingent claim for environmental cleanup costs under Washington statutes in effect before the bar dates. *Chicago III*, 3 F.3d at 207-08.

On remand, the magistrate judge compared Union Pacific's liability under the Model Act with its liability under three arguably relevant Washington statutes in effect in 1985: The Water Pollution Control Act ("Water Act"), Wash. Rev.Code ch. 90.48; the Hazardous Waste Management Act ("Hazardous Waste Act"), Wash.Rev.Code ch. 70.105; and the state nuisance statute, Wash.Rev.Code ch. 7.48 (hereinafter referred to collectively as "the prior existing statutes"). The magistrate judge found that liability under the Model Act is premised on the mere ownership of a contaminated site. In other words, the owner of the site need not be responsible for the contamination; mere ownership is

sufficient to create liability under the Model Act. R & R at 6. The magistrate judge then compared this strict liability scheme with the liability schemes of the prior existing statutes. The magistrate judge concluded that no similar type of strict liability could be imposed under either the Water Act or the Hazardous Waste Act. As for the state's nuisance statute, the magistrate judge concluded that, even if Union Pacific could be held liable for merely failing to remedy the existing contamination at the railyard, its liability would still be far less certain than under the Model Act; moreover, any damages for which Union Pacific might have been held responsible would have been much less.

In light of the Seventh Circuit's directions on how to proceed on remand, this court concludes that the magistrate judge employed the correct methodology in this case for determining whether, prior to the bar dates, Union Pacific had a "claim" for indemnification for the purposes of section 77. The Seventh Circuit refused to address, and instead directed this court to address, the question of "what liabilities under the Model Act existed in 1985 by virtue of Washington state statutes then in effect." *Chicago III*, 3 F.3d at 208. The court also suggested that a section-by-section comparison of the Model Act with the prior existing statutes

> could indicate whether a particular type of liability under the Model Act existed under predecessor statutes prior to the bar dates, and whether Union Pacific consequently had a contingent claim for environmental cleanup costs under Washington statutes in effect before the bar dates.

Id. In this court's view, the most straightforward reading of these quoted passages indicates that the Seventh Circuit directed this court to ascertain whether Union Pacific faced the same type of liability under the Model Act as Union

Pacific faced under the prior existing statutes.[4] This is exactly what the magistrate judge did. In doing so, he considered the basis of the potential liability under the various statutes, the relative likelihood of liability under them, as well as the possible damages faced under them. The court concludes that the magistrate judge correctly followed the mandate of the court of appeals. CMC's objection to the R & R based on the appropriate section 77 standard is overruled.

III.

CMC's third objection is that, in comparing the Model Act with other Washington statutes, the magistrate judge misinterpreted those other statutes. As discussed above, the magistrate judge compared Union Pacific's liability under the Model Act with its potential liability under the prior existing statutes, namely, the Water Act, the Hazardous Waste Act, and the state nuisance statute. The magistrate judge began by ascertaining the basis of liability under the Model Act. The magistrate judge correctly noted that liability under the Model Act can be premised on the mere ownership of a contaminated site. See Wash.Rev.Code § 70.105D.040. What CMC objects to are the magistrate judge's conclusions regarding the nature of liability under the prior existing statutes. The court will address CMC's objections to the magistrate judge's conclusions regarding each of these statutes in turn.

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[4] This interpretation is supported by the Seventh Circuit's description of CMC's arguments on appeal: CMC argues that the district court erred in determining that Union Pacific could not have known of its state law liabilities until after the consummation order was filed; *it asserts that the Model Act did not create new duties but merely recodified existing duties under the [Water Act, the Hazardous Waste Act], and accompanying regulations*. *Id.* at 206 (emphasis added). CMC's argument to the court of appeals implied that, on remand, the task was simply to determine whether the liabilities arising under the Model Act were the same as those arising under the prior existing statutes.

A. The Water Act

The prohibitory section of the Water Act provides:

> It shall be unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of the commission, as provided for in this chapter.

Wash.Rev.Code § 90.48.080. The magistrate judge rejected CMC's argument that this section imposed liability against Union Pacific similar to that imposed under the Model Act. R & R at 8-11. An examination of the plain language of the Model Act and the Water Act corroborates the magistrate judge's conclusion.

The Model Act sets forth a list of persons who "are liable with respect to a [contaminated] facility." Wash. Rev.Code § 70.105D.040(1). Among those persons listed is the "owner or operator of the facility." *Id.* In contrast, before liability attaches under the Water Act, the party must have, at a minimum, "allowed to seep or otherwise discharged into [any of the waters of the state] any organic or inorganic matter that shall cause or tend to cause pollution of such waters." Wash. Rev.Code § 90.48.080. In short, the Model Act targets those who own contaminated sites (regardless of whether those sites are the source of pollution to state waters), whereas the Water Act targets only those who allow contamination from a site to pollute the waters of the state.

CMC contends that the magistrate judge erred because Washington case law supports the view that the Water Act imposes strict liability on landowners for failing to prevent pollution to state waters, regardless of source. The court finds CMC's argument unpersuasive for several reasons.

First, CMC concedes that liability under the Water Act attaches only in cases of pollution to state waters. It is clear that liability under the Model Act is not limited in this way. Second, the cases relied on by CMC all involve an affirmative act on the part of the landowner (or his agent) that caused the pollution to state waters. See *Sea Farms, Inc. v. Foster & Marshall Realty*, 42 Wash.App. 308, 711 P.2d 1049 (1985) (defendants' dredging for construction of marina alleged to have caused silt to deposit on and damage plaintiff's oyster beds), *review denied*, 105 Wash.2d 1010 (1986); *Clark v. United States*, 660 F.Supp. 1164 (W.D. Wash.1987) (defendant's disposal of waste materials in landfills and burn pits alleged to have resulted in contamination of plaintiffs' water supply); *Nordevin, Inc. v. State of Washington, Department of Ecology*, 1992 WL 172977 (Washington Pollution Control Board) (defendant's improper regrading alleged to have caused significant sediment-laden run-off in adjacent waterway).[5]

CMC also objects to another aspect of the magistrate judge's decision concerning the Water Act. According to CMC, the magistrate judge erred in inferring that the DOE lacked authority to institute remediation proceedings against Union Pacific under the prior existing statutes based on the fact that the DOE delayed instituting such proceedings until after the passage of the Model Act. As CMC points out, the EPA delayed instituting remediation proceedings at the railyard under CERCLA even though the EPA had similar information as the DOE about contamination there. This delay, however, does not lead to the conclusion that the EPA lacked authority to order a clean-up. See Objections at 13.

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[5] CMC also relies on *In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 6 F.3d 1184, 1192 (7th Cir.1993) ("*Chicago IV*"). A thorough review of that case reveals that it does not even discuss the Water Act or any other Washington environmental statute. The court assumes that CMC's citation to *Chicago IV* was the result of carelessness rather than a deliberate attempt to mislead.

CMC has a valid argument on this point, but it avails CMC little. For as Union Pacific notes, the magistrate judge's conclusion regarding the inference to be drawn from DOE's delay in instituting clean-up proceedings was simply a response to CMC's argument in support of its renewed motion. CMC had argued that because DOE exercised extensive regulatory jurisdiction over environmental conditions in the area, it necessarily had authority to order a clean-up or to assert a cognizable claim for damages. However, the mere fact that DOE spent considerable time identifying and assessing the pollution in the Commencement Bay area does not necessarily mean that the prior existing statutes authorized DOE to order a clean-up. Although the court does not agree with the inference drawn by the magistrate judge from DOE's delay, the court does not believe that that one faulty aspect of the magistrate judge's reasoning undermines the magistrate judge's ultimate conclusion that the liability under the Water Act was not the same as that under the Model Act.

CMC's objection to the magistrate judge's conclusion with respect to the Water Act is overruled.

B. The Hazardous Waste Act

The Hazardous Waste Act includes the following prohibitory provision:

> No person shall dispose of designated extremely hazardous wastes at any disposal site in the state other than the disposal site established and approved for such purpose under provisions of this chapter.

Wash.Rev.Code § 70.105.050. The magistrate judge noted that the Hazardous Waste Act makes liable any party who violates this provision and thereby injures another. Wash.Rev.Code § 70.105.097. The Hazardous Waste Act defines "dispose or disposal" as "the discarding or abandoning of hazardous wastes or the treatment, decontamination, or recycling of such wastes once they have

been abandoned." Wash.Rev.Code § 70.105.010(4). Given these provisions, the magistrate judge concluded that DOE certainly "had the authority to clean the site up and assert a valid cause of action against the party responsible for the disposal of oil at the railyard." R & R at 12-13. The magistrate judge proceeded to observe that "[i]t is far less clear . . . whether [DOE] could have asserted a cause of action against Union Pacific" because "[b]oth the text of the Hazardous Waste Act and the regulations promulgated thereunder refer to liability and responsibility only with regard to the party *responsible for the violation.*" *Id.* at 13. As support, the magistrate judge cites the regulations implementing the Hazardous Waste Act. They provide in relevant part that the DOE "may require the person responsible for the spill or discharge to . . . [c]lean up all released dangerous wastes or hazardous substances." Wash. Admin.Code § 173-303-145(3)(a)(i).

CMC argues that the magistrate judge ignored the definition of "discharge," which the applicable regulations define as "the accidental or intentional release of hazardous substances . . . such that [they] may enter or be permitted to enter into the environment." Wash.Admin.Code § 173- 303-040(24). "Release" is defined so as to "include[] . . . the actions of: Spilling, leaking, pumping, pouring, emitting, dumping, emptying, depositing, placing, or injecting." *Id.* CMC implies that Union Pacific somehow "leaked" the hazardous substances at the railyard and therefore was liable for clean-up, presumably under Wash.Admin.Code § 173-303-145(3)(a)(i). Objections at 14-15.

CMC cites no evidence to support the proposition that Union Pacific "leaked" hazardous substances at the railyard. Indeed, this court previously found that, after the purchase, "Union Pacific's only action with regard to the railyard was to remove existing structures and clean up the surface of the yard." Memorandum and Order of October 21, 1992, at 4. Absent evidence that Union Pacific leaked or otherwise released any of the contaminants, Union Pacific was not a

party responsible for the discharge of the contaminants. Union Pacific could not be held liable under the Hazardous Waste Act for clean-up costs merely by virtue of its ownership of the railyard. Hence, Union Pacific did not face the same liability under the Model Act as it faced under the Hazardous Waste Act. The magistrate judge did not err in so finding.[6]

CMC's objection to the magistrate judge's conclusion with respect to Hazardous Waste Act is overruled.

C. Washington State Nuisance Statute

Under Washington law, it is a public nuisance [t]o throw or deposit any offal or other offensive matter, or the carcass of any dead animal, in any watercourse, stream, lake, pond, spring, well, or common sewer, street, or public highway, or in any manner to corrupt or render unwholesome or impure the water of any stream, pond, lake, or well, to the injury or prejudice of others.

Wash.Rev.Code § 7.48.140(2). The magistrate judge noted that, "[b]ased on the above definition, it could reasonably be argued that Union Pacific's failure to remedy the existing contamination on the site constituted an actionable public nuisance." R & R at 14-15. Nevertheless, the magistrate judge concluded that two fundamental differences existed between the nuisance statute and the Model Act: (1) the relative uncertainty of liability under the nuisance statute as compared to the Model Act, and (2) the lesser likelihood that liability under the nuisance statute would result in clean-up costs, given that the area around the railyard is extensively polluted. R & R at 15-16.

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[6] CMC also argues that the magistrate judge "wrongly ignored the definition of persons 'having control over oil' as to who [DOE] could take enforcement action." Objections at 15. As Union Pacific points out, CMC cites no authority for its proposed definition. Nor does CMC indicate how this definition fits into the statutory or regulatory scheme of the Hazardous Waste Act. Therefore, the court finds that this argument is waived.

CMC argues that, under Washington law, the "[v]iolation of pollution laws, including specifically the violation of the Water Act, is a nuisance." Objections at 16-17. CMC cites *Miotke v. City of Spokane*, 101 Wash.2d 307, 678 P.2d 803 (Wash.1984) as support. *Miotke* does not stand for the proposition that a violation of the Water Act is a public nuisance per se. Rather, the court in Miotke analyzed the nuisance laws and concluded that the pollution in that particular case (which was caused by an act that violated the Water Act permit scheme) met the definition of a public nuisance. *Miotke*, 101 Wash. at 330-31, 678 P.2d at 816-17.

CMC maintains that the magistrate judge erred in concluding that liability under the nuisance laws "is far less certain than it is under the Model Act, which provides for strict liability on the basis of ownership." R & R at 15-16. CMC notes that under Washington law, "[e]very successive owner of property who neglects to abate a continuing nuisance upon, or in the use of such property caused by a former owner, is liable therefor in the same manner as the one who first created it." Wash.Rev.Code § 7.48.170. Nevertheless, this fails to address the magistrate judge's point, which was that to establish a nuisance, a party must demonstrate that the defendant committed a wrongful act or omission and that the party suffered tangible harm in its ability to enjoy its property. In contrast, liability under the Model Act is relatively certain, based as it is on mere ownership of a contaminated site. R & R at 15-16.

Finally, CMC takes issue with the magistrate judge's distinction between the Model Act and the nuisance statute regarding the calculation of damages. The magistrate observed that nuisance damages are limited to personal injuries and property damage flowing from the nuisance. The magistrate then reasoned that because

> the railyard is located in a section of Tacoma characterized by heavy industry and which is extensively contaminated[,] it seems unlikely

> that the polluted nature of the railyard makes it any more bothersome to adjoining landowners than it would be in a pristine condition. Therefore, even if a successful nuisance claim could have been brought against Union Pacific for the pollution [of] the yard, the resultant damages would have been far less substantial than those faced by Union Pacific under the Model Act, and would likely have not involved clean-up damages.

R & R at 16. As CMC notes, however, a damages remedy is not the only remedy available for a nuisance. Abatement is a possible remedy under Washington State law. See Wash. Rev. Code § 7.48.180, -.200, -.230, -.260. If Union Pacific were liable under the nuisance statute, it could bear the cost of abating the nuisance, *i.e.*, cleaning up the contamination. Therefore, the court does not agree that the distinction based on the calculation of damages is relevant to the comparison of the Model Act and the nuisance statute.

Nevertheless, as noted above, nuisance liability is far less certain than liability under the Model Act. In addition, the nature of the liability differs between the Model Act and the nuisance statute: Liability under the Model Act is premised on mere ownership of a contaminated facility, whereas liability under the nuisance statute is based on "corrupt[ing] or render[ing] unwholesome or impure the water of any . . . spring, stream, pond, lake, or well, to the injury or prejudice of others." Wash.Rev.Code § 7.48.140(2). Although a contaminated site can be the source of such corruption, it need not be. For these reasons, the court concludes that Union Pacific's potential liability under the Model Act was of an entirely different nature than its potential liability under state nuisance law.

CMC's objections to the magistrate judge's conclusions with regard to the state nuisance statute are overruled,

except to the extent the magistrate judge relies on the distinction based on the calculation of damages.

ORDERED: Except as specifically noted in the body of this Memorandum Opinion and Order, CMC's objections to the Report and Recommendation are overruled, and the court adopts the Report and Recommendation of the magistrate judge. CMC's renewed motion to enjoin Union Pacific's state law claims for remediation is denied.

George W. Lindberg
District Judge

Date: December 28, 1994

APPENIDX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF	) In Proceedings for the
	) Reorganization of a Railroad
CHICAGO, MILWAUKEE,	)
ST. PAUL and PACIFIC	)
RAILROAD COMPANY	)
	) No. 77 B 8999
Debtor.	) Prentice H. Marshall, Judge

ORDER NO. 866

FINAL DECREE

Upon consideration of the Trustee's Motion for Entry of a Final Decree, filed pursuant to the Trustee's Modified 1985 Plan of Reorganization (the "Plan"), due notice having been given to creditors, stockholders and other parties in interest, the Court, acting as a Court of Reorganization for the Debtor pursuant to Section 77 of the Bankruptcy Act of 1898, as amended ("Section 77"), finds and concludes as follows:

1. The Chicago, Milwaukee, St. Paul and Pacific Railroad Company, the Debtor in this proceeding, a Wisconsin corporation, filed on December 19, 1977 its petition to this Court to effect a plan of reorganization under Section 77. A copy of that petition was filed at the same time with the Interstate Commerce Commission (the "Commission"). This Court has jurisdiction over the proceedings pursuant to Section 77.

2. The Court approved the petition as properly filed on December 20, 1977. Stanley E.G. Hillman was appointed trustee of the property of the Debtor on February 13,

1978. Mr. Hillman was succeeded as Trustee by Richard B. Ogilvie on August 29, 1979. Mr. Hillman from the date of his appointment until August 20, 1979, and Mr. Ogilvie from that date until the present time, have continued in the possession and control of the property and assets of the Debtor and their operation.

3. On March 31, 1983, the Trustee filed with the Court an Amended Plan of Reorganization for the Debtor, which was referred to the Commission by order of this Court. After due notice and hearings, the Commission, in orders served September 26, 1984, and January 11, 1985, approved a modified version of the Trustee's plan.

4. On February 19, 1985, this Court, in Order No. 809, approved the sale of the Debtor's operating rail assets to the Soo Line Railroad Company and its affiliate The Milwaukee Road, Inc., formerly SLRCO, Inc. (collectively "Soo") pursuant to the terms of an Asset Purchase Agreement ("APA") between the Trustee and Soo.

5. On April 10, 1985, the Commission, upon petition of the Trustee, issued a decision in which it ruled that further modifications to the Trustee's Amended Plan need not be considered by the Commission.

6. On May 1, 1985, the Trustee filed with this Court his 1985 Plan of Reorganization for the Debtor (the "Plan"). The Plan recognized the sale of the operating assets to Soo but otherwise incorporated the essential provisions of the plan approved by the Commission. After due notice to creditors, stockholders and other parties in interest was given in accordance with Order No. 811, this Court held hearings, received evidence, and heard the arguments of counsel on June 24, 25 and 27, 1985 and on July 12, 1985 for the purpose of considering approval and confirmation of the Plan.

7. On July 12, 1985, this Court entered its Order No. 832 modifying the Plan in certain respects and confirming and approving the Plan as modified.

8. The Plan authorizes and directs the Trustee to proceed with the consummation of the Plan, but provides for the retention of jurisdiction by this Court with respect to the consummation of the Plan, including the entry of a final decree pursuant to Section 77(f) discharging the Trustee and closing the case, except as provided below.

9. The Trustee has substantially completed the consummation of the Plan and it is now appropriate for this Court to enter a Final Decree with respect to certain matters involved in the consummation of the Plan and on the discharge of the Trustee.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The "Consummation Date" for purposes of the Plan shall be November 25, 1985.

2. The APA and the Plan require the amendment of the Debtor's articles of incorporation to change its corporate name. The form of amendment to the Debtor's articles of incorporation attached as Exhibit A is approved in all respects. The Trustee is authorized and directed to file that amendment with the appropriate officials in order to effect the change of the Debtor's name. The filing officer in the State of Wisconsin is directed to accept the amendment and to issue the appropriate certificate reflecting the change of the Debtor's name.

3. The following people, who have been recommended by the Trustee as provided in the Plan, are appointed to serve as directors of the Reorganized Company until the first meeting of shareholders of the Reorganized Company:

Jack Nash	Clarence G. Frame
Ezra H. Zilkha	Robert C. Reed
Peter Sharp	Edwin Jacobson
Leon Levy	Daniel R. Murray

Jerold S. Solovy

4. a. The Trustee has recommended and the Court approves the deposit at Consummation Date a total of $225,000,000 million (less the amount paid with respect to Allowable Claims prior to the Consummation Date) in the Segregated Account established by the Plan, and in the Appeal Escrow Account described in paragraph 4b below, with $129,200,898.58 in the Segregated Account and $95,799,101 42 in the Escrow Appeal Account. Five days before the approved Consummation Date the Trustee shall file with this Court and serve on the parties a report showing the amount of Allowable Claims paid prior to Consummation Date and the resulting amount required to be deposited in the Segregated Account. The Segregated Account, but not the Appeal Escrow Account provided for in paragraph 4b, shall be held pursuant to the form of Escrow Agreement attached as Exhibit B. The Escrow Agent shall be the Continental Illinois National Bank and Trust Company of Chicago or such other bank as may be designated from time to time by this Court. The Escrow Agent is instructed to pay money out of the Segregated Account only as provided in the Plan, this Order, or further orders of this Court, and to invest the Segregated Account as provided in paragraph 5.

The Reorganized Company is directed to pay Allowable Claims from the Segregated Account (or from other moneys if no money remains in the Segregated Account), as provided in Section 5.2 of the Plan, except for Class B Claims, which are provided for in paragraph 4b. The Reorganized Company is also directed to pay the reasonable fees of the Escrow Agent for its services with respect to the custody of the Segregated Account.

b. In addition to the Segregated Account provided for in paragraph 4a, there is also established, pursuant to Order 858A, the Appeal Escrow Account of $95,799,101.42 (established 10/16/85), as security for the Class B Claims until disposition of CMC's appeal and the Committee's cross-appeal

from Orders 831 and 832. The Appeal Escrow Account shall be held separate and apart from the Segregated Account and shall be subject only to the terms of Order 858A.

5. Amounts in the Segregated Account shall be invested in (i) direct obligations of the United States or obligations of agencies of the United States or obligations which are backed by the full faith and credit of the United States, (ii) certificates of deposit or similar debt obligations of banking institutions, such as bankers' acceptances or repurchase agreements, of commercial banks insured by the Federal Deposit Insurance Corporation, (iii) direct and general obligations of any state which are rated in either of the two highest full rating categories by at least one nationally recognized rating agency, (iv) commercial paper rated not lower than P-1 or P-2 by Moody's Investors Service, Inc., or not lower than A-1 or A-2 by Standard and Poor's Corporation, or (v) money market funds with fixed principal values and which invest only in instruments with credit ratings equivalent to those specified above. Investments shall be made at the direction of the Reorganized Company. Investment earnings on amounts in the Segregated Account may be paid out to the Reorganized Company as realized.

6. On the Consummation Date all right, title and interest of the Trustee in the property of the Estate shall vest in and become the absolute property of the Reorganized Company, notwithstanding the laws of any state or the decision or order of any state authority to the contrary. Except as otherwise provided in this Order or in the Plan, the Reorganized Company shall take the property free and clear of all claims, rights, demands, interests, liens and encumbrances of every kind and character. The Trustee is authorized and directed to execute and deliver to the Reorganized Company a deed and bill of sale transferring all of the property of the Estate. The form of those instruments shall be determined by the Trustee. All property and funds of the Estate held by persons other than the Trustee shall be delivered or paid over to the Reorganized Company, except (i) the Segregated

Account and (ii) escrow accounts pertaining to Tax Benefit Transfer Leases which run in favor of the lessor.

7. Except as provided in this Order or in the Plan, the Debtor, the Trustee in his representative capacity and the Reorganized Company shall be, as of the Consummation Date, released forever from: (i) all obligations, debts, liabilities, claims and causes of action against the Debtor, whether or not filed or presented, whether or not approved, acknowledged or allowed in these proceedings and whether or not provable in bankruptcy, including without limitation all claims assumed or guaranteed by the Debtor or the Trustee or enforceable against the property of the Debtor; (ii) all obligations, debts, liabilities and claims arising from costs and expenses of administration, whether or not filed or presented and whether or not approved, acknowledged or allowed in these proceedings, including without limitation all taxes, assessments, claims and other charges of governmental units or agencies, whenever assessed, accruing prior to the Consummation Date; and (iii) all obligations, debts, liabilities and claims with respect to all bonds, coupons, debentures, notes, certificates, evidences of indebtedness, shares of stock, securities and leases (including interest accrued and dividends declared), without limitation as to their nature and whether made, assumed or guaranteed by the Debtor or the Trustee or enforceable against any of them or the property of any of them.

8. Notwithstanding paragraph 7 above, the Reorganized Company shall be liable and responsible for the payment of Allowable Claims after the Consummation Date as provided in Section 5.2 of the Plan, for those Allowable Claims described in Section 5.6 of the Plan, for its obligations under contracts assumed by the Trustee pursuant to Section 6.1 of the Plan and for obligations of the Trustee arising during the administration of the Estate to the extent that the Trustee is bound by those obligations (including, without limitation, the Trustee's obligations under the APA and Order 809), provided, however, that the Reorganized Company shall not be liable and responsible for claims against the Trustee in his individual

capacity and, with respect to such claims, shall not indemnify the Trustee as provided hereinafter. The Reorganized Company shall indemnify the Trustee, his agents, attorneys and employees against any and all expenses (including attorney's fees), costs, fees, liabilities and fines arising out of the matters for which the Reorganized Company shall be liable as set forth in this Paragraph 8 or which pertain to or arise out of the administration of the Estate or the conduct of the reorganization proceedings, except where this Court determines that indemnification is inappropriate.

9. The Court reserves jurisdiction, which shall be exclusive to the extent that under applicable law the Court's jurisdiction is now exclusive:

(a) To consider and act with respect any Claim against the Debtor or the Trustee included in a class provided for under the Plan or with respect to any contingent claim (which shall not include claims against the Trustee in his individual capacity), asserted but not finally settled or adjudicated prior to the Consummation Date;

(b) To consider and act on any matter over which the Court now has jurisdiction and which has not been adjudicated, discharged or resolved prior to the Consummation Date (including questions and controversies arising under or with respect to the APA and Order 809);

(c) To consider and act on any application for instructions with respect to the Segregated Account, including the distribution of funds from, and any claim upon, the Segregated Account;

(d) To consider and act with respect to the allowance of fees to the Trustee, his staff and counsel, and other parties pursuant to Section 9.1 of the Plan; and

(e) To consider and act upon any other matter as to which the Plan reserves jurisdiction in this Court.

10. The Reorganized Company is authorized and directed to file or record, in each of the jurisdictions in which

it owns real property, a copy of this Order and the deed transferring the property of the Estate to the Reorganized Company. The recording officer in each such jurisdiction shall accept those documents for recording. No tax (including stamp, conveyance, transfer and similar taxes) or other fee shall be imposed with respect to the conveyance of the property of the Estate to the Reorganized Company, except for ordinary and customary fees for the recordation of documents.

11. The APA provides that if all inaccuracies in deeds and other instruments of conveyance from the Trustee to the Soo have not been corrected prior to the consummation of the Plan, the Plan will contain provisions for continued correction of the deeds and other instruments of conveyance. Pursuant to the agreement of the parties to the APA, this Order, rather than the Plan, sets forth provisions for the continued correction of deeds and other instruments of conveyance. The APA also provides for certain adjustments to the purchase price for the Railroad. Soo has claimed that it is entitled to such an adjustment.

The Trustee and the Soo are authorized and directed to continue to negotiate in good faith, prior to the Consummation Date, the settlement of disputes relating to the correction of deeds and other instruments of conveyance and the adjustment of the purchase price under the APA. If, by the Consummation Date, the Trustee and the Soo have not resolved those disputes, the Reorganized Company and the Soo shall, for 90 days following the Consummation Date, negotiate in good faith to settle the disputes. During the 90 day period, neither the Reorganized Company nor the Soo shall sell, mortgage or encumber real property which immediately prior to the closing of the APA on February 19, 1985 was owned or operated by the Trustee and located within those states in which the Trustee conducted rail operations, without giving prior written notice to the other more than 15 days prior to the proposed action. In the event of disagreement over a proposed action, either party may apply to this Court for appropriate relief. If no settlement of these matters has been completed by the end of that 90 day

period, this Court shall hear and resolve the remaining disputes, and retains jurisdiction for that purpose.

12. Except as provided in this Order or the Plan, as of the Consummation Date, the Trustee shall be discharged and shall be relieved of any further duties and responsibilities in respect of the administration of the property or the conduct of the business of the Debtor. The Trustee is forever discharged and released from any liability for any claim in his representative capacity which is barred pursuant to the Plan. His bond shall be released when all claims against him in his individual capacity are finally resolved and satisfied.

13. All persons, firms, corporations and other entities, including without limitation the United States and state and local governmental bodies and agencies ("Entities"), are by this Order perpetually restrained and enjoined from instituting, prosecuting, or pursuing, or attempting to institute, prosecute, or pursue, any suit, action or proceeding ("Action") against the Reorganized Company (or its successors and assigns), or against any of the assets or property of the Reorganized Company (or of its successors and assigns), directly or indirectly, by reason of or on account of any obligation or obligations incurred by the Debtor or by the Trustee, except the obligations imposed upon or required to be assumed by the Reorganized Company by the Plan (including those claims filed pursuant to Section 11.1 of the Plan which are ultimately determined to be Allowable Claims) or this Order. The Actions restrained and enjoined by this Order include, without limitation, those based upon or on account of any right, claim, judgment or interest of any kind or nature in, to, or against the Debtor or any of its assets or properties, or which interfere with, attach, garnish, levy upon, enforce liens against or upon, or in any manner disturb any portion of the property (real or personal) now or in the future belonging to or being in the possession of the Reorganized Company (or its successors and assigns), or which interfere with or take steps to interfere with the Reorganized Company, its officers, agents and employees, or the conduct of its business.

All Entities are also by this Order restrained and enjoined from prosecuting against the Trustee in his representative capacity or against the Reorganized Company any Action arising out of or based on any act done or omitted to be done in consummating and carrying out the Plan or any order of this Court entered in these proceedings. Notwithstanding any of the foregoing, nothing in this Order shall preclude the further prosecution of any appeal previously noticed and pending as of this date.

14. Except as provided in this Order, all jurisdiction of this Court in or by reason of these proceedings shall be terminated and these proceedings shall be closed effective as of the Consummation Date.

Dated: November 12, 1985

ENTER:

/s/ Prentice H. Marshall
District Judge

Supreme Court, U.S.
FILED
AUG 8 1996
CLERK

(2)

No. 96-44

In The

Supreme Court of the United States

October Term, 1995

CMC HEARTLAND PARTNERS,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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19 pp

QUESTION PRESENTED

This case presents the limited question under Section 77 of the Bankruptcy Act of 1898, formerly 11 U.S.C. § 205 (1976) (repealed 1978) of whether claims based on a statute enacted subsequent to a discharge in bankruptcy are barred by the consummation order. There is no division of the circuits on this issue.

PARTIES TO THE PROCEEDING

Union Pacific Railroad Company is a wholly-owned subsidiary of Union Pacific Corporation. During the pendency of this litigation Union Pacific Railroad Company sold the property which is the subject to this litigation to the Port of Tacoma; in connection with that sale Union Pacific Railroad Company assigned its rights and responsibilities in this litigation to the Port of Tacoma. The Port of Tacoma is a public port district which owns and operates harbor facilities in Tacoma, Washington, and is the real party-in-interest to this litigation. The Court of Appeals declined to substitute parties.

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STATEMENT OF THE CASE

This case is one of many arising out of the bankruptcy of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company ("Milwaukee Road"). That bankruptcy petition was brought and consummated under Section 77 of the Bankruptcy Act of 1898, 11 U.S.C. § 205 (repealed 1978). App. at 21a.

THE RAILYARD

In March of 1980 Union Pacific Railroad Company ("Union Pacific") purchased certain railroad rights-of-way and railyards from the Trustee in Bankruptcy of the Milwaukee Road, including an abandoned railyard in Tacoma, Washington ("Railyard"). Under the terms of the Purchase Agreement Union Pacific received an indemnification from the Trustee, in which the Trustee agreed to indemnify Union Pacific against any and all claims, damages, liabilities, losses or demands whatsoever, regardless of the source or nature thereof, arising out of the operation of the Properties prior to March 12, 1980. App. at 23a.

After the purchase Union Pacific did not operate the Railyard, but did remove the existing structures and track, and cleared the surface of the yard. App. at 5a, 24a. The Railyard sat vacant until 1990 when Union Pacific commissioned a pre-sale environmental audit, which was completed on June 29, 1990. This audit identified subsurface contamination consisting primarily of petroleum hydrocarbons. App. at 27a. This 1990 environmental audit was the first subsurface investigation performed at the Railyard, and as required by law, Union Pacific notified

the Washington Department of Ecology ("Ecology") of the release identified in this assessment. App. at 27a. Based on Union Pacific's notification, Ecology identified Union Pacific as a Potentially Liable Party ("PLP") with respect to subsurface contamination at the Railyard. App. at 27a.

THE PLAN OF REORGANIZATION

Five years before the environmental audit was performed, and the subsurface contamination detected, the Milwaukee Road completed its reorganization and had approved a Plan Of Reorganization. As originally proposed in the draft Plan Of Reorganization, the Scope of The Bar for future claims included claims for contribution and indemnification arising after the consummation date, but which were based on events occurring prior to the consummation date. R. 9, Ex. 12 at 6. The Soo Line Railroad Company and the Milwaukee Road, Inc. (collectively "Soo Line") objected to this provision of the Plan on the grounds that it was unfair, inequitable and discriminatory with respect to certain unliquidated claims. R. 9, Ex. 12. Soo Line requested the Court to modify the Plan to provide for the assumption of contingent and unliquidated claims by the Reorganized Company, so that contingent and unliquidated claims survived the Bar Date. Soo Line cited employees' asbestos-related suits which might be filed in the future as an example of claims which received unfair treatment and which would have required the filing of contingent, unliquidated claims before the bar date. R. 9, Ex. 12 at 5-9. Soo Line asserted that the assumption of contingent, unliquidated claims by

the Reorganized Company was the only way to satisfy the statutory requirement that a reorganization plan under Section 77 of the Bankruptcy Act be fair and equitable. R. 9, Ex. 12 at 12-13.

As a result of these and other objections the Plan of Reorganization was modified to allow for the survival of contingent and unliquidated claims based on facts unknown, undisclosed and unasserted before the bar dates. R. 1, Ex. A at § XI, 11.2. This Amendment was approved by the Court as part of the Plan of Reorganization. R. 1, Ex. A.

On November 2, 1985 the Reorganization Court entered Order No. 866 in the Bankruptcy Proceedings of the Milwaukee Road (the "Consummation Order"); that Order does not enjoin the prosecution or assertion of claims for obligations imposed upon, or required to be assumed by the Reorganized Company, by the Plan or by the Consummation Order. App. at 73a.

PROCEDURAL HISTORY

CMC initially filed a motion for injunctive relief which sought to preclude Union Pacific from pursuing claims for environmental remediation under both the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.* ("CERCLA") and the Washington Model Toxics Control Act ("Model Act"). After discovery and extensive briefing, on October 21, 1992 the District Court granted CMC's Motion as it pertained to the CERCLA claims, and denied the Motion as it pertained to any claims Union Pacific may have under the Model Act. App. at 37a-38a.

CMC and Union Pacific cross-appealed from the District Court's decision, and the Seventh Circuit affirmed the District Court's decision to the extent it barred Union Pacific's CERCLA claims. With respect to the District Court's holding that Union Pacific's claims under the Model Act survived, the Seventh Circuit acknowledged the general rule that claims based on a subsequently enacted statute are not barred. App. at 33a. Because no finding had been made on CMC's argument that the Model Act did not create new liabilities, the Court remanded the case for a determination: " . . . as to what liabilities under the Model Act existed in 1985 by virtue of Washington state statutes then in effect." App. at 44a-45a, 34a.

On remand, the District Court referred CMC's renewed motion to a Magistrate Judge, who issued a Report and Recommendation ("R&R") which found that the Model Act created an entirely new basis for environmental clean-up liability under Washington state law, and recommended denying CMC's Renewed Motion. App. at 54a-55a. CMC filed objections to the R&R; after briefing and oral arguments the District Court overruled the objections, adopted the R&R (with some minor exceptions) and denied CMC's Renewed Motion. App. at 48a.

On appeal the Seventh Circuit determined that the previously existing Washington statutes did not provide the basis for filing a contingent claim in the bankruptcy proceeding, and affirmed the District Court. App. at 17a.

At no time in the proceedings below did CMC assert or argue the question it seeks to have this Court review.

Similarly, none of the courts below have considered or passed on that question.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS OF LIMITED PRECEDENTIAL VALUE

CMC urges this Court to grant the writ because of the broad application of the issue at bar, and the sharp division in the circuits over that issue. Contrary to CMC's arguments, the decision below is of limited application because: a) it was decided under the Bankruptcy Act of 1898, which was repealed in 1978 and has a far different definition of claim than the Bankruptcy Code; b) the Plan of Reorganization was specifically modified to allow for the survival of contingent and unliquidated claims; and, c) there is no split in the circuits on this issue, as only two appellate courts have decided the narrow issue present in this case, and those courts are in agreement.

A. Section 77 Of The Bankruptcy Act Defines Claims Narrowly

CMC suggests that a claim under Section 77 of the Bankruptcy Act is the same as a claim under the Bankruptcy Code. This is simply wrong, and a significant distinguishing factor between the Seventh Circuit's decision and the cases cited by CMC. Proceedings under Section 77 of the Bankruptcy Act are unique, as the sole purpose of that section is the reorganization and rehabilitation of the debtor so that it may continue business in

some new form, not the simple liquidation of the debtor's assets and distribution of the proceeds to creditors. *See*, 5 Collier on Bankruptcy § 77.20 (14th Ed. 1978). The Bankruptcy Act generally relies on the concept of provable claims, and allows payment of only those claims which are capable of proof. *In re Edge*, 60 B.R. 690, 694 (Bankr. M.D. Tenn. 1985). Claims not capable of proof are not discharged, and holders of such claims are permitted to pursue the debtor's post-petition assets. *Id.*

Because a Section 77 bankruptcy is like an equitable receivership, and the goal is reorganization, the definition of a Section 77 claim is broader than other sections of the 1898 Act. *See* Bankruptcy Act of 1898, § 77(b), formerly 11 U.S.C. § 205(b) (1976) (repealed 1978). However, the Section 77 definition is far more limited than the definition of claim under the Bankruptcy Code. Under Section 77, unlike other sections of the Act, it is possible to provide for claims which are not "provable" by having the new corporation assume these contingent liabilities. Collier on Bankruptcy § 77.20 (14th Ed. 1978). Even under Section 77, claims not capable of proof are not discharged, and survive the bankruptcy.

The Bankruptcy Code, in a significant departure from the Act, gives the broadest possible definition to claims, and contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be discharged in the bankruptcy case. *See In re Black*, 70 B.R. 645, 648-49 (Bankr. D. Utah 1986) and discussion therein; *see also In re Edge*, 60 B.R. 690, 694 (Bankr. M.D. 1986). Under the Code, even contingent and unliquidated obligations are claims subject to discharge. *See* 11 U.S.C. § 101(4)(A).

It is this latter, broad definition of claim which CMC seeks to have this Court interpret, not the narrower definition of claim under Section 77 of the Bankruptcy Act. The distinctions between these two definitions of claims, and repeal of the Bankruptcy Act, make this case inappropriate for review by this Court.

B. The Plan Of Reorganization Specifically Allows For The Post-Discharge Assertion Of Claims Based On Causes Of Action Arising After The Bar Dates

Consistent with the requirement that a plan of reorganization under Section 77 be fair and equitable, the Milwaukee Road's plan was modified to provide for the survival of contingent and unliquidated claims based on facts unknown, undisclosed and unasserted as of the bar dates. The example given at the time was asbestos-related suits which might be filed in the future, and which upon filing would trigger a right to contribution from the debtor. In the face of these concerns the plan was modified to allow the assertion of claims against the successor corporation even when the cause of action arose after the bar dates, but the relevant conduct occurred before the bar dates.

This plan modification is consistent with how Section 77 manages claims which are not capable of proof at the time of discharge. The claim Union Pacific is now pursuing was not capable of "proof" under Section 77, as Union Pacific could not have reasonably estimated its clean-up liability under a statute which was not yet enacted.

The Seventh Circuit's decision does not give precedence to state law in determining when a claim arises, instead it applies the definition of claim set forth in the plan of reorganization, and properly allows for the survival of this contingent and unliquidated claim. This is not an example of the parade of horribles posited by CMC, but a fair interpretation of the Consummation Order, which exempts from its reach "[o]bligations imposed upon or required to be assumed by the Reorganized Company by the Plan . . . ". App. at 73a. This obligation was imposed on CMC in 1985, when the Plan was approved, not by later action of the Seventh Circuit.

This decision's application is not broad, as CMC argues, but narrow and limited by its own facts. This is not the case in which to consider the broader issues CMC attempts to raise.

C. The Seventh Circuit And The Third Circuit Agree On When A Claim Based On A Later Enacted Statute Arises

Only the Third and Seventh Circuit Courts of Appeal have addressed the issue of when a claim based on a statute adopted after the bar dates arises. *See In re Penn Central Transportation Co.*, 944 F.2d 164 (3d Cir. 1992), *cert. denied*, 503 U.S. 906 (1992); App. at 3a. Both of those courts concluded that claims based on a statute enacted after the discharge date are not barred. *Id.* Significantly, both of these decisions were decided under Section 77 of the Bankruptcy Act of 1898, not the Bankruptcy Code.

In contrast, none of the other cases cited by CMC concern a later enacted statute, and all of these cases were

decided under the Bankruptcy Code of 1978, 11 U.S.C. § 101, *et seq. See In re Piper Aircraft Corp.*, 58 F.3d 1573, 1574 (11th Cir. 1995); *In re Jensen*, 995 F.2d 925, 927 (9th Cir. 1993); *Grady v. A.H. Robbins Co.*, 839 F.2d 198, 199 (4th Cir. 1988), *cert. dismissed*, 487 U.S. 1260 (1988).

These courts criticize the Third Circuit's formulation of when a claim arises as stated in the case of *In re Frenville Co.*, 744 F.2d 332 (3d Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985), not the Seventh Circuit's formulation in this case or the Third Circuit's holding in *Penn Central*. *Frenville*, like the cases criticizing it, was decided under the Bankruptcy Code, under the Bankruptcy Act, and did not concern a later enacted statute. *Id.* at 333.

The "split in authority" postulated by CMC simply does not exist in this case. Only the Third and Seventh Circuit Courts of Appeal have decided this issue; both are in agreement and neither relied on *Frenville* or the rationale of that case. This case is not *Frenville*, does not rely on *Frenville*, and should not be reviewed because some courts disagree with *Frenville*.

II. THE QUESTION PRESENTED BY THE PETITIONER WAS NOT PRESSED OR PASSED ON IN THE COURTS BELOW

CMC urges this Court to review the decision below on an issue which was not presented to either the District Court or Court of Appeals, and on which neither passed. This request ignores the traditional rule of this Court, which usually declines to consider questions presented in a petition for certiorari which have not been considered by the lower court. *Youakim v. Miller*, 425 U.S. 231, 234, 96

S.Ct. 1399, 1401, 47 L.Ed. 2d 701 (1976) (per curiam). This Court will generally review a question not raised in the courts below only in exceptional circumstances. *Duignan v. United States*, 274 U.S. 195, 200, 47 S.Ct. 566, 568, 71 L.Ed. 996 (1927). There are no exceptional circumstances here, and this Court should decline to review this matter.

A. First Ruling Of The District Court

On its initial Motion for Injunctive Relief CMC argued that: "[s]ince Union Pacific could have brought a CERCLA claim before the bar dates, and did not, it should be barred from bringing a similar state law claim although the state statute was not in effect at the time of the reorganization." App. at 44a. The District Court denied CMC's request to bar Union Pacific's state law claim, relying on *In re Penn Central*, 944 F.2d 164 (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992) (finding that claim for CERCLA remediation costs was not discharged in bankruptcy when the consummation order was entered before CERCLA was enacted). App. at 44a-45a. The District Court reasoned that Union Pacific could not have known of its claim under a statute which was not enacted as of the bar date. App. at 44a. This fundamental holding has never been challenged by CMC; instead, its argument since that time has been limited to whether previously existing Washington State statutes imposed similar liabilities on Union Pacific.

B. First Appeal To The Seventh Circuit

On CMC's appeal from the order of the District Court, it argued that the Model Act was essentially a recodification of other Washington state statutes, and that those existing statutes imposed clean-up liability on Union Pacific before the bar dates. App. at 29a, 33a. The District Court had made no findings with respect to that argument (as it was not presented to the court), and the Seventh Circuit remanded the case for a determination of "[w]hether a particular type of liability under the Model Act existed under predecessor statutes prior to the bar dates, and whether Union Pacific consequently had a contingent claim for environmental clean-up costs under Washington statutes in effect before the bar dates." App. at 34a.

C. Proceedings On Remand

The District Court referred the matter to a Magistrate Judge for determination of this narrow issue. The Magistrate Judge issued a Report and Recommendation ("R&R") which compared Union Pacific's liability under the Model Act with its liability under earlier existing Washington State statutes, and concluded the earlier statutes did not impose liability on Union Pacific. App. at 54a-55a. CMC objected to the R&R on the grounds that the Magistrate Judge: 1) assumed facts not in the record; 2) misapplied the Seventh Circuit's standard pertaining to a definition of claim under the Bankruptcy Act; and, 3) improperly interpreted Washington state law. App. at 47a.

The District Court rejected CMC's arguments and adopted the R&R with minor exceptions. App. at 48a. With respect to the definition of claim CMC did not argue, as it does now, that the claim arose at the time the conduct occurred. Instead, CMC argued that the proper test under Section 77 is whether Union Pacific had a contingent claim based on the possible liability Union Pacific could have faced under other state laws. App. at 50a. In rejecting CMC's argument regarding the proper test under Section 77, the District Court examined the definition of claim under Section 77 of the Bankruptcy Act and the Seventh Circuit's direction on remand. App. at 51a-55a. The District Court did not examine, and did not reach, the issue of whether the claim arose when the underlying conduct occurred, as that issue was never raised by CMC. *Id.*

D. Second Appeal To The Seventh Circuit

On appeal CMC once again argued that the previously existing Washington State statutes imposed liability on Union Pacific so that a later claim based on the Model Act was barred. App. at 9a. CMC's argument, and the Seventh Circuit's opinion, focused on the comparison between the Model Act and other Washington statutes; CMC did not argue, and the Court did not address, the question of whether the claim arose when the underlying conduct occurred. App. at 1a-18a.[1]

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[1] CMC did file a Petition for Rehearing and Suggestion for Rehearing En Banc in which it argued that this decision misapplied the earlier definition of claim established by the

The question raised by CMC now was not presented to either the District Court or to the Seventh Circuit Court of Appeals. This new argument, formulated in a last ditch effort to "save the day" after defeat below, should not be considered by this Court. There are no unusual circumstances or compelling reasons to break with this Court's tradition of declining to review questions not pressed or passed on by the courts below. The writ should be denied.

CONCLUSION

The "parade of horribles" feared by CMC will not flow from the Seventh Circuit's decision. This case was decided under Section 77 of the Bankruptcy Act of 1898 (repealed 1978), and based on a plan of reorganization which specifically provides for the survival of contingent and unliquidated claims. The narrow issue of whether claims based on a statute adopted after the discharge date are barred has been addressed by only two circuits, which agree such claims are not. Additionally, the issue as now framed by CMC was not raised in or addressed by the courts below.

Seventh Circuit, and that the decision elevated state law over federal bankruptcy law. However, that is a far different issue from the question CMC now presents.

For the foregoing reasons the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

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No. 96-44

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CMC HEARTLAND PARTNERS,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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August 20, 1996

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The question in this case is whether a State can frustrate the federal bankruptcy laws by creating, after a federal bankruptcy discharge, a new cause of action that imposes liability based on conduct that took place before the discharge. The bankruptcy discharge in this case occurred more than a decade ago. Petitioner CMC Heartland Partners, the successor-in-interest to the bankrupt Milwaukee Road, has since established itself in the business of real estate management and development. Nonetheless, respondent Union Pacific insists that CMC is now subject to potentially enormous liability for conduct that occurred years *before* the discharge under a state statute that was not enacted until years *after* the discharge. The Seventh Circuit agreed.

The implications of that decision are stunning. It threatens to subject the twin foundations of the federal bankruptcy laws—the need for a comprehensive and equitable settlement of debts and a "fresh start" for the debtor—to the vagaries of state law. A federal bankruptcy discharge would be wholly meaningless if States remained free to impose liability for known pre-discharge conduct by simply creating a new legal cause of action. The decision below thus poses a fundamental threat to the efficiency and integrity of the federal bankruptcy process.

Union Pacific, however, argues that the decision below is of little practical moment for three reasons: (1) it was decided under § 77 of the Bankruptcy Act of 1898, which allegedly has a "far different" definition of "claim" than the 1978 Bankruptcy Code, Opp. Br. at 5-7, (2) the particular plan of reorganization in this case "specifically allows" the post-discharge claims at issue here, *id.* at 7-8, and (3) this case does not implicate the circuit split identified in the petition, *id.* at 8-9. In addition, Union Pacific argues that the question presented in the petition was not raised below. *Id.* at 9-13. None of these arguments can withstand even casual scrutiny.

1. Union Pacific first argues that the definition of "claim" under § 77 of the 1898 Act is "narro[w]," and thus "far different" from the "broad" definition in the 1978 Code. Opp. Br. at 5, 7. That is simply untrue. As the court below recognized, the definition of "claim" in § 77 of the 1898 Act is "broad," and in all material respects identical to the definition in the 1978 Code. *See* App. at 30a; *see also In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 974 F.2d 775, 781 (7th Cir. 1992) ("Just as Section 77 of the 1898 Act broadly defines claims, the new Bankruptcy Code also broadly defines claims. Compare 11 U.S.C. § 205(b) (repealed 1978) and 11 U.S.C. § 101(4)(A) and (B) (enacted 1978).").

Union Pacific's argument to the contrary is misleading at best. Union Pacific emphasizes that "generally" the 1898 Act provides only for the discharge of "provable" claims. Opp. Br. at 6 (citing *In re Edge*, 60 B.R. 690, 694 (Bankr. M.D. Tenn. 1985)). That observation is correct but irrelevant. This case arises under § 77 of the 1898 Act, which specifically provides that a "claim" need *not* be "provable" and may be contingent. *See, e.g.*, 5 Collier on Bankruptcy § 77.20 at 602-03 & n.8 (14th ed. 1978); *In re Radio-Keith-Orpheum Corp.*, 106 F.2d 22, 26-27 (2d Cir. 1939), *cert. denied*, 308 U.S. 622 (1940); *cf. Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 942-43 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985).[1] It is hardly surprising, then, that Union Pacific provides no citation for its remarkable assertion that "the Section 77 definition is *far more limited* than the definition of claim under the Bankruptcy Code." Opp. Br. at 6 (emphasis added). The court below in no way purported to draw any such distinction between the 1898

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[1] The definition of "claims" under § 77(b) includes "debts, whether liquidated or unliquidated . . . or other interests of whatever character." 11 U.S.C. § 205(b) (repealed 1978). The definition of "creditors" under that section, in turn, includes "all holders of claims of whatever character against the debtor or its property, *whether or not such claims would otherwise constitute provable claims under this title.*" *Id.* (emphasis added).

and 1978 statutes; to the contrary, it highlighted their virtually identical definition of "claim," *see* App. at 21a-22a, 30a, and relied indiscriminately on cases decided under both. There is no reason to suppose, thus, that the decision below can or will be limited to the 1898 Act. If the broad definition of "claim" under the 1898 Act does not prevent a State from creating new post-discharge liabilities based upon known pre-discharge conduct, neither does the equally broad definition of "claim" under the 1978 Code.

Even if the decision below could be limited to the 1898 Act, moreover, it would still have enormous practical significance. Because the 1978 Code does not apply retroactively, the 1898 Act continues to govern any dispute (like this one) that involves a bankruptcy filed before October 1, 1979. *See, e.g., In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 6 F.3d 1184, 1186 n.1 (7th Cir. 1993). The decision below thus has the effect of opening the door for States to impose new obligations on a successor of any entity that filed for bankruptcy over the eight decades between 1898 and 1979. The impact will be felt not just by the railroad industry, but by a substantial portion of American industry across the board.

As a practical matter, thus, the decision below not only has far-reaching implications for bankruptcies filed under the 1978 Code, but also brings the 1898 Act back to life. This case is quite unlike the ordinary case in which a statute's repeal deprives it of practical effect. *See, e.g., Sanks v. Georgia*, 401 U.S. 144, 147-53 (1971); *District of Columbia v. Sweeney*, 310 U.S. 631 (1940); *cf. Triangle Improvement Council v. Ritchie*, 402 U.S. 497, 498-99 (1971) (Harlan, J., concurring in dismissal of *certiorari*). Where, as here, a repealed statute continues to have important practical effects, this Court has not hesitated to grant review. *See, e.g., Territory of Alaska v. American Can Co.*, 358 U.S. 224, 225 (1959).

2. Union Pacific next argues that, regardless of the underlying law, the Reorganization Plan in this case

"specifically allows for the post-discharge assertion of claims based on *causes of action* arising after the bar dates." Opp. Br. at 7 (emphasis added). That argument can most charitably be characterized as counter-intuitive.

The Reorganization Plan in this case specifically provides for the post-discharge assertion of contribution or indemnity claims only when "based on *facts* that are unknown, undisclosed and unasserted" as of the bar date. App. at 24a (quoting Plan of Reorganization § 11.2) (emphasis added). The Plan thus reflects the settled law that "a claim arises at the moment when *acts giving rise to the alleged liability* are performed." *In re Waterman S.S. Corp.*, 141 B.R. 552, 556 (Bankr. S.D.N.Y. 1992) (emphasis added). What matters, in other words, is the underlying conduct, not the legal label attached thereto.

Union Pacific remarkably tries to turn the Plan to its advantage by equating a "fact" with a "cause of action." *See* Opp. Br. at 7-8. Thus, Union Pacific argues that the Plan in this case allows "the assertion of claims against the successor corporation even when the *cause of action* arose after the bar dates, but the relevant *conduct* occurred before the bar dates." Opp. Br. at 7 (emphasis added). The creation of a new cause of action after a bankruptcy discharge, however, is a development of *law*, not of *fact*. The *facts* underlying Union Pacific's current claims—the environmental contamination at the Tacoma railyard—were anything but "unknown, undisclosed and unasserted" at the time of the discharge. *See* App. at 30a-33a. The Plan in no way purports to authorize claims based on a post-discharge *legal* development.

Indeed, Union Pacific's argument is particularly unpersuasive under the facts of this case, where the "new" state-law cause of action (the MTCA) mirrors a pre-existing federal cause of action (CERCLA) that is concededly barred. The decision below simply provides a roadmap for state law to revive a claim barred after a federal bankruptcy discharge by

enacting a copycat statute and applying it retroactively to pre-discharge conduct. That result is senseless and unfair.[2]

3. Union Pacific third argues that this case does not implicate the circuit split identified in the petition because it is limited to "the issue of when a claim *based on a statute adopted after the bar dates arises*." Opp. Br. at 8. *See also id.* at i. On this narrow issue, Union Pacific asserts, there is no circuit conflict. *See id.* at 8-9 (citing *In re Penn Central Transp. Co.*, 944 F.2d 164 (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992)).

Union Pacific's asserted limitation is wholly artificial. The lower courts are divided on the question whether, as a matter of federal bankruptcy law, a "claim" arises at the time when the conduct underlying the claim occurs, or at the time when a cause of action based on that conduct arises under state law. *Compare In re Piper Aircraft Corp.*, 58 F.3d 1573, 1576 & n.2 (11th Cir. 1995), *and Grady v. A.H. Robins Co.*, 839 F.2d 198, 201-02 (4th Cir.), *cert. dismissed*, 487 U.S. 1260 (1988), *with In re Frenville Co.*, 744 F.2d 332, 335-36 (3d Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985). It is immaterial *why*, in any particular case, a cause of action arises after the underlying conduct on which it is based.[3] Union Pacific's attempt to

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[2] It is worth noting that Union Pacific's current claims are based entirely on the contribution right created by the MTCA long after the discharge, *not* the indemnification right contained in the contract of sale. Union Pacific lost its contractual indemnification right (like its CERCLA contribution right) by failing to file any contingent claim during the Milwaukee Road bankruptcy proceedings. *See, e.g., In re THC Financial Corp.*, 686 F.2d 799, 802-04 (9th Cir. 1982).

[3] In some cases (like this one) the cause of action arises after the underlying conduct by virtue of a newly-enacted statute. In other cases, the cause of action arises after the underlying conduct because that conduct does not immediately result in actionable injury. *See, e.g., Piper*, 58 F.3d at 1576 & n.2; *Grady*, 839 F.2d at 201-02. There is no relevant difference between these two situations.

distinguish the acknowledged circuit split by artificially narrowing the question presented in this case is nothing but semantic sleight-of-hand.

4. Finally, and most desperately, Union Pacific attempts to avoid review by asserting that "the question presented by the petitioner was not pressed or passed on in the courts below." Opp. Br. at 9. That is not true.

To the contrary, CMC consistently argued below that Union Pacific's current claim for contribution under the MTCA (like its claim for contribution under CERCLA) should be barred because Union Pacific knew about the underlying contamination at the Tacoma railyard but failed to file any contingent claims during the Milwaukee Road bankruptcy proceeding. Thus, in the first round of litigation before the Seventh Circuit, CMC argued that "[t]he district court erred . . . in concluding that even though the *same facts* form the basis for Union Pacific's MTCA [and CERCLA] claims, Union Pacific could not have constructive knowledge of those claims because MTCA was not enacted until 1989." Brief of Appellant CMC Heartland Partners, Nos. 92-3713 and 92-3790 (12/21/92), at 18 (emphasis added). *See also* Responsive Brief/ Reply Brief of Appellant/Cross Appellee CMC Heartland Partners, Nos. 92-3713 and 92-3790 (2/19/93), at 22 ("The test . . . is not whether a claim for contribution has fully accrued (under whichever statute it is deemed to arise), but whether the claimant had knowledge of a known release of a hazardous substance, knowledge of likely response costs under the applicable statutes, and knowledge that the hazardous spill resulted from the activities of the debtor.").

The Seventh Circuit resolved the first round of litigation below by holding that Union Pacific's MTCA claim would be barred if similar liability existed under other Washington statutes prior to the discharge. *See* App. at 33a-34a. That holding set the agenda for the remand; it is no surprise that the second round of litigation focused on the question of "what

liabilities under the [MTCA] existed [at the time of discharge] by virtue of Washington state statutes then in effect." *Id.* at 34a. But that does not mean that CMC is now precluded from seeking review of the broader issues that it raised in the first round of litigation. To the contrary, it is well-settled that a party is entitled to raise in a petition for *certiorari* all issues presented in earlier stages of the litigation. *See, e.g., Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973); *Urie v. Thompson*, 337 U.S. 163, 172-73 (1949); *cf. Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of *certiorari*).

CONCLUSION

For the reasons stated in the petition for writ of *certiorari* and herein, the petition should be granted.

Respectfully submitted,

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No. 96-44

In the Supreme Court of the United States

OCTOBER TERM, 1996

CMC HEARTLAND PARTNERS, PETITIONER

v.

UNION PACIFIC RAILROAD COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether, for purposes of bankruptcy law, a liability claim based on a state statute can arise before enactment of the statute that creates liability for that conduct.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-44

CMC HEARTLAND PARTNERS, PETITIONER

v.

UNION PACIFIC RAILROAD COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Petitioner is the successor of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company (Milwaukee Road), which was reorganized under Section 77 of the Bankruptcy Act of 1898, 11 U.S.C. 205 (1976), in accordance with a consummation order entered in 1985. After the entry of the consummation order, Union Pacific Railroad Company sought reimbursement from petitioner for the cost of cleaning up hazardous wastes at a property, located in Tacoma, Washington, that was formerly owned by Milwaukee Road. Union Pacific asserted its claims under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, and the Washington State Model Toxics Control

Act (MTCA), Wash. Rev. Code §§ 70.105D.010 *et seq.* (1994). Petitioner filed this action in the district court that had jurisdiction over the reorganization to enjoin Union Pacific from asserting those claims. That court enjoined Union Pacific from asserting liability claims under CERCLA, but refused to enjoin Union Pacific from asserting analogous claims under the MTCA, which had not been enacted until after the court's order consummating the bankruptcy reorganization. The court of appeals affirmed that ruling.

1. The Constitution grants Congress the power to "establish * * * uniform Laws on the subject of Bankruptcies." U.S. Const. Art. I, § 8, Cl. 4. During the nineteenth century, Congress exercised that power by enacting a series of bankruptcy statutes that allowed insolvent debtors to discharge their debts through the liquidation of their assets. See Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803); Act of Aug. 19, 1841, ch. 9, 5 Stat. 440 (repealed 1843); Act of Mar. 2, 1867, ch. 176, 14 Stat. 517 (repealed 1878); Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978). Those statutes generally did not provide businesses with an opportunity to satisfy their debts through reorganization. In response, financially encumbered businesses, particularly railroads, employed the device of the equity receivership to adjust their debts while remaining in operation. See John C. Anderson, *Chapter 11 Reorganizations* §§ 1.01-1.06 (1995).

During the Great Depression, Congress recognized the need to provide a mechanism for reorganization under the federal bankruptcy laws. Based on the experience gained through equity receiverships, Congress amended the Bankruptcy Act of 1898 to provide for reorganization of bankrupt business entities. Those amendments included enactment of: (1) Section 77, which governed railroad reorganizations (see Act of Mar. 3, 1933, ch. 204, § 1, 47 Stat.

1474); (2) Section 77B, which governed other business reorganizations (see Act of June 7, 1934, ch. 424, § 1, 48 Stat. 912); and Chapters X through XII, which replaced Section 77B (see Chandler Act, ch. 575, § 1, 52 Stat. 883-930 (1938)). See generally 5 Lawrence P. King, *Collier on Bankruptcy* ¶ 1100.01 (15th ed. 1996); John C. Anderson, *Chapter 11 Reorganizations* §§ 1.01-1.06 (1995); James W. Moore, *Moore's Bankruptcy Manual* (1939).

In 1978, Congress comprehensively revised the federal bankruptcy laws through enactment of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, which repealed and prospectively replaced the Bankruptcy Act of 1898 and its amendments. The revised laws are currently codified as the Bankruptcy Code, 11 U.S.C. 101 *et seq.* Chapter 11 of the Bankruptcy Code provides for reorganization of debtors. See 11 U.S.C. 1101 *et seq.* The provisions of Chapter 11 are generally similar, but not identical, to those contained in the 1898 Act.

Under Chapter 11, a debtor (and, in certain circumstances, other parties in interest) may submit a plan for reorganization. See 11 U.S.C. 1121. Creditors are entitled to express approval of or opposition to the plan. See 11 U.S.C. 1126. If the plan satisfies specific requirements contained in the Code, a court may confirm it. See 11 U.S.C. 1129. As a general matter, the confirmation of a reorganization plan "discharges the debtor from any debt that arose before the date of such confirmation" unless the plan or order confirming the plan provides otherwise. 11 U.S.C. 1141(d).

2. On December 19, 1977, Milwaukee Road petitioned the United States District Court for the Northern District of Illinois for reorganization under Section 77 of the Bankruptcy Act of 1898, 11 U.S.C. 205 (1976), which was then in force. While the reorganization was in progress, Union Pacific purchased approximately 100 miles of rail-

road right-of-way and various properties from the bankruptcy trustee for Milwaukee Road. Pet. App. 2a, 23a-24a. The properties included a railyard in Tacoma, Washington, that Milwaukee Road had owned from the early years of this century. *Id.* at 24a. As part of that transaction, which took place on December 19, 1980, Union Pacific received a covenant from the Trustee and Milwaukee Road "to indemnify and save harmless Union Pacific * * * against any and all claims * * * arising out of the operations of the properties prior to March 12, 1980." *Id.* at 39a.

The reorganization progressed through the enactment of the Bankruptcy Reform Act of 1978, which provided that ongoing reorganizations would continue to be governed by the 1898 Act. See Pub. L. No. 95-598, § 403, 92 Stat. 2683. On July 12, 1985, the district court confirmed the debtor's reorganization plan and established bar dates for post-petition claims. Pet. App. 2a, 24a. On November 12, 1985, the court entered a consummation order that barred and discharged all claims against the Trustee, Milwaukee Road, and petitioner, as Milwaukee Road's successor, except as provided in the reorganization plan. See *ibid.* That plan bars all claims for contribution and indemnity existing as of the confirmation and consummation dates except "claims for contribution or indemnity based on facts that are unknown, undisclosed or unasserted" as of those dates. *Id.* at 42a.

3. While petitioner's reorganization was in progress, Union Pacific learned through various inspections and reports that the Tacoma site contained discarded industrial materials. Pet. App. 24a-27a. In 1990, after the consummation of petitioner's reorganization, Union Pacific decided to sell the property. It commissioned a pre-sale environmental audit, which disclosed subsurface contamination from petroleum and other products. *Id.* at 27a. That audit heightened concerns about potential liability

under federal and state law. The United States and the State of Washington had each enacted legislation imposing retrospective liability on responsible parties for the remediation of sites containing improperly discarded hazardous substances. See CERCLA § 107, 42 U.S.C. 9607; MTCA § 4, Wash. Rev. Code § 70.105D.040 (1994). Congress enacted CERCLA in 1980, see Pub. L. No. 96-510, 94 Stat. 2767, while the Washington legislature enacted the MTCA in 1989, see 1989 Wash. Laws ch. 2.

Union Pacific notified the United States Environmental Protection Agency (EPA) and the Washington Department of Ecology (DOE) of the contamination. Pet. App. 27a. The DOE informed Union Pacific that it was potentially liable for clean-up of the property under the MTCA, which obligates the owner of a contaminated property, as well as others who contributed to the hazards, to clean up the site. See Wash. Rev. Code § 70.105D.040 (1994). Union Pacific ultimately entered into an agreement with the DOE to assume responsibility for cleaning up the property and moved forward with the remedy. See Pet. App. 27a.

4. On September 9, 1991, Union Pacific sent petitioner a letter seeking to negotiate over petitioner's potential liability for clean-up and response costs to be incurred at the Tacoma site. Pet. App. 27a. In response, petitioner filed this action in the Illinois district court that confirmed the bankruptcy reorganization and requested that court to enjoin Union Pacific from prosecuting any claims respecting the site. *Ibid.* While petitioner's request for an injunction was under consideration, Union Pacific filed a complaint against petitioner in the United States District Court for the Western District of Washington for its response costs, predicating liability on CERCLA, the MTCA, and the indemnification terms of the original sales contract. *Id.* at 27a-28a.

The Illinois district court granted in part petitioner's motion to enjoin Union Pacific's action. Pet. App. 37a-46a. The court observed that, under the terms of the consummation order, petitioner remained liable for "claims for contribution or indemnity based on facts that are unknown, undisclosed or unasserted" as of the relevant confirmation and consummation dates. *Id.* at 42a. The court concluded that Union Pacific, which had participated in the reorganization proceedings, had adequate knowledge under the facts presented here to have asserted a CERCLA claim in those proceedings. *Id.* at 44a.

The district court ruled, however, that the consummation order did not bar Union Pacific's MTCA claim, because the MTCA "had not been enacted by the State of Washington at the time the consummation order was entered" and Union Pacific "could not possibly have known of its liability under a statute that was not in existence until four years after the bar dates were established." Pet. App. 45a, citing *In re Penn Central Transp. Co.*, 944 F.2d 164 (3d Cir. 1991), cert. denied, 503 U.S. 906 (1992). The court accordingly entered an order enjoining Union Pacific from "asserting or attempting to prosecute" any claims for contribution or indemnity under CERCLA, but did not extend that relief to claims under the MTCA. *Id.* at 46a. Both parties appealed.

5. The court of appeals affirmed the district court's judgment in part, vacated it in part, and remanded for further proceedings. Pet. App. 19a-34a. The court of appeals concluded that the controlling issues were whether: (1) "Union Pacific's claim for indemnification of its liability under federal law arose before the discharge and thus was barred"; and (2) "Union Pacific's claim for indemnification of its liability under state law arose after the discharge and thus was not barred." *Id.* at 23a. The court of appeals agreed with the district court "that Union

Pacific's claim under CERCLA was barred," but remanded the case for further consideration of the MTCA claim. *Ibid.*

The court of appeals explained that Union Pacific's CERCLA claim was barred because Union Pacific could have asserted that claim in the bankruptcy proceeding. Pet. App. 30a-33a. The court had previously stated in *In re Chicago, Milwaukee, St. Paul & Pacific Railroad*, 974 F.2d 775 (7th Cir. 1992), that Section 77(b) of the Bankruptcy Act of 1898, 11 U.S.C. 205(b) (1976) (repealed 1978), "broadly defines claims to include 'debts, whether liquidated or unliquidated . . . or other interests of whatever character.'" 974 F.2d at 780. The court accordingly ruled in that case that a potential CERCLA claimant is obligated to submit a CERCLA claim in a Section 77 reorganization, even if the claim is contingent on the occurrence of additional events, if the potential claimant has evaluated a contamination problem and "can tie the bankruptcy debtor to a known release of a hazardous substance which th[e] potential claimant knows will lead to CERCLA response costs." *Id.* at 786. See Pet. App. 21a-22a. Applying that reasoning, the court of appeals concluded that the district court had correctly determined that Union Pacific had sufficient constructive knowledge of the contamination problem during the reorganization proceeding to file a "contingent" CERCLA claim before the bar dates. *Id.* at 30a-33a.

The court then turned to petitioner's contention on appeal that Union Pacific's MTCA claim was also barred. Pet. App. 33a-34a. Petitioner did not contest that the MTCA went into effect after the bar dates or that, under prevailing law, "claims based on a statute enacted after discharge in bankruptcy are not barred." *Id.* at 33a. See

Penn Central, 944 F.2d at 168. Petitioner instead argued as follows:

> The crucial factor in the district court's refusal to bar Union Pacific's MTCA claims was the fact that MTCA was enacted in 1989 *after* the bar dates and consummation order in the Milwaukee Road bankruptcy. The district court accepted Union Pacific's contention that, as a matter of law, a bankruptcy claim cannot be barred unless the precise statute under which the claim is asserted already existed before the bar date.
>
> [Petitioner] maintain[s] that as a matter of law the district court has articulated and applied an incorrect test. The proper legal test should be to determine whether a newly-enacted statute creates new rights for the putative claimant or merely recodifies existing rights. If the latter, as is the case here, the claim must be barred.

Appellant CMC Heartland Partners C.A. Br. 17 (Nos. 92-3713 & 92-3790). See *id.* at 17-26.

Based on that submission, the court of appeals vacated the district court's judgment on the MTCA claim and remanded the case with directions that "the district court first determine what liabilities under the [MTCA], if any, were imposed under previous Washington statutes, and then decide what, if any, specific cleanup liabilities under previous state statutes were discharged because no claims were timely presented to the bankruptcy court." Pet. App. 23a. See *id.* at 33a-34a.

6. On remand, the district court referred the case to a magistrate judge who compared the cause of action available under the MTCA to three Washington state statutory schemes existing at the time of the bankruptcy. The magistrate judge concluded that the MTCA created lia-

bility different from that imposed by those pre-existing statutes. See Pet. App. 4a, 54a-55a. Petitioner filed objections to the magistrate judge's report, but the district court overruled those objections. *Id.* at 47a-64a. The court determined that the question on remand was "whether Union Pacific faced the same type of liability under the [MTCA] as Union Pacific faced under the prior existing statutes." *Id.* at 55a-56a. It carefully examined the content of the prior state statutes and concluded that the MTCA imposed a new form of liability. *Id.* at 57a-64a.

7. Petitioner appealed again, and the court of appeals affirmed the district court's decision. Pet. App. 1a-18a. The court of appeals reviewed the prior history of the case, *id.* at 2a-8a, and stated that in its prior decision it had "joined other courts * * * in concluding that claims based on a statute enacted after the discharge date are not barred," *id.* at 3a, citing *Penn Central*. The court then examined whether, "in 1985, * * * Union Pacific ha[d] a contingent claim, based on the three existing Washington statutes, which would bar its claim based on Washington's 1989 [MTCA]." *Id.* at 9a. The court found that "[t]he Washington statutes did not provide the comprehensive liability or remedy found in the [MTCA]." *Id.* at 10a. See *id.* at 10a-17a. It accordingly concluded that the "Washington statutes existing in 1985 did not form the basis for the filing, by Union Pacific, of a contingent claim in the Milwaukee Road bankruptcy proceeding." *Id.* at 17a. The court of appeals also rejected petitioner's claim that newly discovered evidence warranted a different result. *Id.* at 17a-18a.

DISCUSSION

Petitioner asks this Court to review whether a federal bankruptcy claim based on state law arises at the time when the conduct underlying the claim occurs, or at the time when state law creates a cause of action imposing liability for that conduct. We submit that review of that issue is not warranted in this case. Petitioner did not present its current legal theory to the court of appeals. Moreover, the court of appeals' decision is correct. There is no conflict among the courts of appeals on the question whether a post-discharge statutory enactment that imposes retrospective liability should be treated as creating a claim that arises at the time the underlying conduct occurred. There is a conflict on the question, not presented here, when a claim that is based on a pre-discharge cause of action, but is dependent on future events, arises for purposes of the Bankruptcy Code. The resolution of that conflict, however, should await a case that squarely presents the issue that has actually divided the courts of appeals.

1. Petitioner seeks review of an issue that was neither developed nor addressed in the proceedings below. In its first decision, the district court concluded that the consummation order discharging the liability of Milwaukee Road and its successors could not bar Union Pacific's claim "under a statute that was not in existence until four years after the bar dates were established for filing claims against the Milwaukee Road." Pet. App. 45a. The district court explicitly followed the Third Circuit's decision in *Penn Central*, which held that a consummation order that was entered before enactment of CERCLA did not discharge a post-consummation CERCLA claim. See 944 F.2d at 168. The district court concluded that *Penn Central* was controlling here, noting that petitioner had

"cite[d] no authority to support barring Union Pacific from prosecuting [its MTCA] claim." Pet. App. 45a.

In its first appeal, petitioner did not challenge the holding of *Penn Central* and similar cases, but instead attempted to distinguish them. Pet. App. 33a. Petitioner argued that, "[i]n those cases, claims were allowed only if the liability of the debtor or the claimant's rights to proceed against the debtor did not exist before the bankruptcy bar dates." Appellant CMC Heartland Partners C.A. Br. 22 (Nos. 92-3713 & 92-3790). Petitioner asserted that the district court had erred "by failing to examine Union Pacific's liability and claims under MTCA to see if they varied from the claims Union Pacific possessed in 1985 but elected not to submit to the reorganization court." *Id.* at 26. The court of appeals responded to that argument by remanding the case to the district court to determine "what liabilities under the [MTCA], if any, were imposed under previous Washington statutes." Pet. App. 23a.

On remand, the district court and a magistrate judge carefully examined that question and concluded that the MTCA imposed a new form of liability. Pet. App. 47a-64a. Petitioner appealed from that ruling, and the court of appeals rejected petitioner's argument that "Union Pacific's environmental clean-up liability was essentially similar under the 1985 Washington state statutes and the [MTCA]." Appellant CMC Heartland Partners C.A. Br. 14 (No. 95-1412) (argument heading). Petitioner did not argue, as its does here, that "[a] federal bankruptcy 'claim' arises at the time the relevant conduct occurs, not at the time state law creates liability based on such conduct." Pet. 8 (argument heading).[1]

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[1] Petitioner gave the first hint of its current argument in its petition for rehearing and suggestion for rehearing en banc. In the last three pages of that document, petitioner challenged the court of appeals'

This Court does not ordinarily grant a petition for a writ of certiorari to consider claims that were not raised below. See, *e.g.*, *Patrick* v. *Burget*, 486 U.S. 94, 99 n.5 (1988); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam); *McCullough* v. *Kammerer Corp.*, 323 U.S. 327, 328 (1945) (per curiam); *Helvering* v. *Minnesota Tea Co.*, 296 U.S. 378, 380 (1935). The Court has distinguished, however, between claims and arguments in support of those claims. Once a writ of certiorari is granted on a properly presented federal claim, "a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron* v. *National R.R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995); *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992). Nevertheless, the Court should be cautious in granting certiorari based on a new legal theory that had not been fully litigated in the current case or a past decision of the court below. See *id.* at 538.

Union Pacific contends that petitioner did not properly present to the court of appeals the claim that it presents here. See Br. in Opp. 9-13. At a minimum, petitioner did not present the legal theory that it now advocates, and the

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decision on policy grounds, stating that the decision "would give state and local governments the ability to vitiate any claims bar date by simply enacting new legislation after the bar date had passed," that the court had "favored *state* environmental policies over competing *federal* policies," and that it had "opened the door to state lawmakers allowing them to thwart federal bankruptcy law." Pet. for Rehearing, with Suggestion for Rehearing in Banc 13-15 (Nos. 95-1412 & 95-2986). Petitioner, however, did not assert its current legal argument or suggest that there was any conflict among the courts of appeals on the question. See 7th Cir. R. 35(b) ("Suggestions that an appeal be reheard en banc must state in a concise sentence at the beginning of the petition * * * with what decision of the United States Supreme Court, this court, or *another court of appeals* the panel decision is claimed to be in conflict." (emphasis added)).

court of appeals had no occasion to address that theory. The court of appeals decided the case based on the arguments placed before it, expressly rejecting petitioner's theory that Union Pacific's claims were barred because Union Pacific could have asserted an analogous claim under the state laws then in existence. Hence, as a preliminary consideration, the Court should be reluctant to address petitioner's new theory without "the benefit of developed arguments on both sides and lower court opinions squarely addressing the question." *Yee*, 503 U.S. at 538.[2]

2. In any event, petitioner's new theory does not warrant review. Petitioner contends that Union Pacific's claim under the MTCA is barred because it "arose *before* the Milwaukee Road's bankruptcy discharge." Pet. 8. According to petitioner, Union Pacific's claim under the MTCA arose when "the contamination or violation occurred" at the Tacoma site, even though the MTCA had not yet been enacted (and Union Pacific did not yet own the site). See Pet. 10 (emphasis and citation omitted). That counter-intuitive contention is not well founded.

Petitioner's argument is contrary to the language of both the Bankruptcy Act of 1898 and the current Bank-

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[2] In response to Union Pacific's brief in opposition, petitioner contends that it consistently argued below that Union Pacific's claim should be barred because Union Pacific knew about the underlying contamination but failed to file a contingent claim. Pet. Reply Br. 6, quoting Appellant CMC Heartland Partners C.A. Br. 18 (Nos. 92-3713 & 92-3790). Petitioner's argument below appears, however, to have been more limited. Petitioner asserted that Union Pacific had the opportunity to file a contingent claim because the MTCA "amount[ed] to little more than a recodification of prior state law" and "provided Union Pacific with no greater, or different, rights against [petitioner] than it had before the bankruptcy bar dates." Appellant CMC Heartland Partners C.A. Br. 18 (Nos. 92-3713 & 92-3790).

ruptcy Code. Section 77(b) of the Bankruptcy Act of 1898 defined "claims" to include

> debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character.

11 U.S.C. 205(b) (1976) (repealed 1978). The current Bankruptcy Code defines a "claim" in relevant part as a

> right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

11 U.S.C. 101(5)(A). The definitions contained in the Bankruptcy Act of 1898 and the current Bankruptcy Code are not necessarily co-extensive, but they lead to the same result in this case. Union Pacific did not have any "interest" or "right to payment" under the MTCA until the State of Washington enacted that statute. See *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 559 (1990) ("a 'right to payment' is nothing more nor less than an enforceable obligation"). It would be farfetched to conclude that Union Pacific had a "contingent" interest or right to payment in 1985 based on the possibility that the State might someday enact a statute that would create the underlying right. See *In re Chateaugay Corp.*, 53 F.3d 478, 497 (2d Cir.), cert. denied, 116 S. Ct. 298 (1995).[3]

Petitioner is mistaken in its contention that the court of appeals "violated federal law and policy by looking to

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[3] See also, *e.g.*, Ralph E. Clark, *Contingent and Immature Claims in Receivership Proceedings*, 29 Yale L.J. 481, 482 (1920) ("A contingent claim is one which is not absolutely owing at the time insolvency occurs and the receiver is appointed, but may ripen into an absolute claim later on.").

state law to determine when a 'claim' arose for federal bankruptcy purposes." Pet. 9. That court simply recognized that *federal bankruptcy law* looks to federal and state non-bankruptcy law in determining whether a potential claimant has a cognizable claim. As this Court has specifically noted, the federal bankruptcy laws provide a mechanism for adjustment of rights and interests that arise "independent" of the bankruptcy process and that exist as a matter of federal or state non-bankruptcy law. *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1982) (plurality opinion); see *Grogan* v. *Garner*, 498 U.S. 279, 283-284 & n.9 (1991); *Vanston Bondholders Protective Comm.* v. *Green*, 329 U.S. 156, 161 (1946); *id.* at 170 (Frankfurter, J., concurring) ("a claim implies the existence of an obligation created by State law"). There is nothing anomalous in the fact that the federal bankruptcy laws do not treat a "claim" as arising until state law creates the "interest" or "right to payment." See *Chateaugay*, 53 F.3d at 497.

There is also no merit to petitioner's contention that the court of appeals' decision has "jeopardized the fundamental predictability and stability of the uniform federal bankruptcy laws." Pet. 11. At bottom, petitioner contends that the federal bankruptcy laws should preempt the application of the MTCA to a reorganized entity. See Pet. 13 n.11 (federal bankruptcy laws "trump inconsistent state enactments outright"). There is no occasion, however, for federal law to preempt state law here, because there is no inconsistency between the bankruptcy laws and the state law involved in this case. The current Bankruptcy Code provides relief from the financial obligations that precipitated insolvency by discharging the debtor "from any debt that arose before the date of such confirmation" unless the plan or order confirming the plan provides otherwise. 11 U.S.C. 1141(d). In this case, Union Pacific did not have a

claim under the MTCA at the time of confirmation, and the current Bankruptcy Code (even if it were applicable) would not have discharged any corresponding debt. See 11 U.S.C. 101(12) (defining "debt" as "liability on a claim"). The same result follows under the Bankruptcy Act of 1898. See 11 U.S.C. 205 (1976). There is simply no conflict between the federal and state laws.[4]

3. We also disagree with petitioner's contention that this case presents an important question that has divided the circuits and warrants immediate review. As an initial matter, there is no conflict among the courts of appeals on the specific issues that the court of appeals actually addressed. The Second, Third, and Seventh Circuits have all concluded that "claims based on a statute enacted after the discharge date are not barred." Pet. App. 3a; see *Chateaugay*, 53 F.3d at 497; *Penn Central*, 944 F.2d at 168. No other courts of appeals have addressed that question.[5]

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[4] Furthermore, petitioner does not contest that Congress has imposed retrospective liability on reorganized entities through CERCLA, which subjects such entities to liability for past waste disposal activities. Pet. 13 n.11 (citing *Penn Central*). Hence, there is no basis to conclude that a State's enactment of complementary laws to achieve the same objective "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). This is, in sum, a particularly unpersuasive context in which to argue that federal bankruptcy laws preempt the States from imposing retrospective liability on all persons who engaged in similar conduct during a defined time period and require the States, instead, to distinguish between those that underwent intervening reorganizations and those that did not.

[5] Notwithstanding petitioner's suggestion of a "parade of horribles" (Pet. 15), we are not aware of any other pending litigation in which a reorganized entity claims immunity from post-discharge statutory enactments that impose retrospective liability.

Furthermore, there is little likelihood that a conflict will develop among the courts of appeals over the question whether the MTCA creates new liability distinct from prior state law. See Pet. App. 10a.

Petitioner contends that this case is part of a larger conflict among the courts of appeals as to when a claim "arises" for purposes of bankruptcy. Pet. 13-15. Petitioner is mistaken in that characterization of this case. There is a disagreement among those courts on the question whether a potential suit that would rest on a cause of action that existed *before* the bankruptcy, but is contingent on future events, is a "claim" for purposes of the Bankruptcy Code. But those cases present an issue that is distinct from the question presented in this case.

The Third Circuit's decision in *In re Frenville Co.*, 744 F.2d 332 (1984), cert. denied, 469 U.S. 1160 (1985), lies at the center of that disagreement. The Third Circuit there held that the Bankruptcy Code's automatic stay provision, 11 U.S.C. 362(a), did not stay a creditor's indemnification suit against the debtor where the creditor's contractual right to indemnification existed before the bankruptcy, but did not mature into a cause of action until after the bankruptcy petition was filed. 744 F.2d at 335-336. Other courts of appeals have criticized *Frenville*'s reasoning and have concluded that a potential suitor can have a "contingent" claim, within the meaning of the Bankruptcy Code, if there is a significant pre-petition relationship between the debtor and the potential claimant, see *Epstein* v. *Official Comm. of Unsecured Creditors of the Estate of Piper Aircraft Corp.*, 58 F.3d 1573, 1577 (11th Cir. 1995); or if the potential claimant has sufficient notice so that the potential liability is within the fair contemplation of the parties at the time of the bankruptcy, see *In re Jensen*, 995 F.2d 925, 930-931 (9th Cir. 1993). See also *In re Chateaugay Corp.*, 944 F.2d 997, 1004-1005 (2d Cir. 1991)

(discussing, but not deciding the issue); *Grady* v. *A.H. Robins Co.*, 839 F.2d 198, 201-203 (4th Cir.) (suggesting in the context of an automatic stay that pre-petition conduct is enough to establish a claim), cert. dismissed, 487 U.S. 1260 (1988).

That conflict over the scope of contingent claims is not implicated here. The cases criticizing *Frenville* all involved potential suits based on a statutory or common law cause of action that was in existence at the time of the bankruptcy. The critical issue in each case was whether a potential suit that would become actionable only on the occurrence of a future event, such as illness or injury that satisfies an element of a product liability cause of action, was a contingent claim for purposes of bankruptcy. None of those cases involved the post-discharge enactment of a new statute. Petitioner is incorrect in asserting that there is "no relevant difference" between those situations. Pet. Reply Br. 5 n.3. A person who can point to an existing but unripe cause of action at the time of a bankruptcy reorganization may have a "contingent" right to payment. See 11 U.S.C. 101(5)(A). But the person who cannot point to an existing cause of action at the time of bankruptcy has no right to payment at all. See *Chateaugay*, 53 F.3d at 497 ("where the statute imposing the liability has not been enacted, 'it would be impossible to find even the remotest "right to payment" ' " (citation omitted)).

Petitioner may be correct that the split of authority precipitated by *Frenville* presents an issue of general importance under the bankruptcy laws. Pet. 14. But this case does not provide an occasion for this Court to attempt to resolve that question. The court of appeals did not cite, discuss, or rely on the reasoning of *Frenville* or any of the cases that have criticized that decision. Nor did it have any reason to do so. Moreover, this case arises under the Bankruptcy Act of 1898, which has been repealed and has

limited continuing importance. If the Court is to provide guidance on the issues raised by *Frenville*, it should await a case that squarely presents those issues and does so in the context of the current Bankruptcy Code.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FILED
JAN 3 1997
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(5)

No. 96-44

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CMC HEARTLAND PARTNERS,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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This supplemental brief responds to the Brief for the United States as Amicus Curiae.

The Solicitor General concedes that "[p]etitioner may be correct that the split of authority precipitated by *Frenville* presents an issue of general importance under the bankruptcy laws." U.S. Br. at 18. Yet because the Solicitor General apparently endorses the result below and the *Frenville* analysis on which it is based, *see id.* at 14-15 & 16 n.4, he goes to great lengths to avoid review here.

1. The Solicitor General first echoes respondent's argument that this Court should deny *certiorari* on the ground that the question presented to this Court is framed more broadly than the issue decided by the courts below. *See* U.S. Br. at 10-13. Like respondent, the Solicitor General emphasizes that the second round of litigation below focused on the narrow question whether the liability imposed by Washington's MTCA was analogous to the liability imposed under prior state law. *See id.* at 11.

As petitioner has already explained, the narrow focus of the second round of litigation was ordained by the Court of Appeals' disposition of the first round of litigation. *See* Pet. Rep. at 6-7. During that first round, petitioner advanced the very argument it advances here—that a federal bankruptcy "claim" can arise even before a state-law cause of action has accrued if the *facts* on which the claim is based are known. *See id.* at 6 (quoting petitioner's appellate briefs).[1]

It is hardly surprising, thus, that the Solicitor General carefully refrains from endorsing respondent's mistaken

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[1] The Solicitor General half-heartedly attempts to explain away one of the passages cited by petitioner from its first-round briefs below, *see* U.S. Br. at 13 n.2, but makes no effort to explain away the other passage, *see* Pet. Rep. at 6. In any event, these incomplete explanations fail to recognize that throughout this litigation petitioner has sought to formulate several related arguments to support its position, both challenging and seeking to distinguish the cases relied on by the court below.

contention that petitioner failed to preserve below the issue presented here. Rather, the Solicitor General asserts only that petitioner's *legal arguments* with respect to that issue now sweep more broadly than before. Even if that assertion were correct (which it is not), the Solicitor General recognizes that it would not preclude this Court's review of the question presented. *See* U.S. Br. at 12-13. The Solicitor General's invocation of amorphous "prudential concerns" to avoid review ignores the fact that the legal and factual issues presented in the petition are fully developed and ripe for review.

Indeed, the Solicitor General acknowledges that the Seventh Circuit *expressly addressed* the very issue presented for review. *See* U.S. Br. at 6 (noting that the Seventh Circuit concluded in the first round of litigation that "'Union Pacific's claim for indemnification of its liability under state law arose after the discharge and thus was not barred'") (quoting Pet. App. at 23a); U.S. Br. at 9 (noting that the Seventh Circuit stated in the second round of litigation that its prior decision had "'joined other courts * * * in concluding that claims based on a statute enacted after the discharge date are not barred'") (quoting Pet. App. at 3a). It is unquestionably appropriate for this Court to review an issue that the court below actually addressed. *See, e.g., Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995).

2. On the merits of the question presented—whether a State can frustrate a federal bankruptcy discharge by imposing new post-discharge liabilities based on known pre-discharge conduct—the Solicitor General's brief only confirms the need for this Court's review. In endorsing the Seventh Circuit's reasoning and result, the Solicitor General tacitly endorses the approach previously adopted by the Third Circuit in *In re Frenville Co.*, 744 F.2d 332 (3d Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985), which has been roundly criticized by courts and commentators for more than a decade. *See* Pet. at 13-15 &

nn. 12, 13. The Solicitor General offers three arguments in support of his position.

First, the Solicitor General asserts that the term "claim" as used in federal bankruptcy law is not broad enough to encompass post-discharge state-law liabilities based on pre-discharge conduct. *See* U.S. Br. at 13-14. He thus echoes a similar position unsuccessfully advanced by the United States in such previous cases as *Pennsylvania Dep't of Public Welfare v. Davenport*, 495 U.S. 552 (1990), and *Ohio v. Kovacs*, 469 U.S. 274 (1985), where this Court emphasized that the term "claim" must be given its broadest possible definition to resolve all conceivable liabilities in a bankruptcy discharge. *See Davenport*, 495 U.S. at 558; *Kovacs*, 469 U.S. at 279; *see also Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991).[2]

Second, the Solicitor General observes that many provisions of federal bankruptcy law incorporate state law by reference. *See* U.S. Br. at 14-15. That observation, however, misses the point. It is one thing for the federal bankruptcy laws to look to state law to determine the legal consequences of pre-discharge conduct in a federal bankruptcy discharge; it is another thing altogether for state law to create or alter rights or obligations based on pre-discharge conduct *after* the discharge.[3]

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[2] Unlike respondent, the Solicitor General acknowledges that, at least for purposes of this case, there is no meaningful difference between the definition of "claim" in § 77 of the Bankruptcy Act of 1898 and the 1978 Bankruptcy Code. *See* U.S. Br. at 14. Petitioner has already explained why this is so. *See* Pet. Rep. at 2-3; *see also Gardner v. New Jersey*, 329 U.S. 565, 573 (1947) ("[T]he sweeping, all-inclusive definitions of 'claims' and 'creditors' in § 77 leave no room for exception under it.").

[3] The Solicitor General's attempt to analogize this case to cases involving post-discharge liabilities created under *federal* law only confuses the issue. *See* U.S. Br. at 16 & n.4 (citing *In re Chateaugay Corp.*, 53 F.3d 478 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995)); *In re Penn Central Transp. Co.*, 944 F.2d 164 (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992). Petitioner

(continued...)

Third, the Solicitor General asserts that the federal bankruptcy laws present no obstacle to the imposition under state law of "retrospective liability on all persons who engaged in similar conduct during a defined time period," even if such persons have undergone a reorganization and received a federal bankruptcy discharge. U.S. Br. at 16 n.4. With all due respect, this position ignores the Supremacy Clause. It is well-established that the federal bankruptcy laws preempt inconsistent state enactments. *See, e.g., Stellwagen v. Clum*, 245 U.S. 605, 613 (1918). Once a reorganized entity has received a federal bankruptcy discharge, it is treated, for federal bankruptcy purposes, as a *new and distinct entity* that does not carry forward any liabilities and obligations from the pre-petition entity.[4] That is the essential foundation of the "fresh start" policy embodied in federal bankruptcy law—a critical point that underscores the importance of the issue presented here. *See* Memorandum to the Solicitor General from Prof. Elizabeth Warren 3-4 (Nov. 6, 1996) (attached as Appendix A). The Solicitor General may sympathize with state environmental laws that "complemen[t]" the federal environmental laws, U.S. Br. at 16 n.4, but such state laws cannot preempt federal bankruptcy law.

3. Finally, the Solicitor General mimics respondent's efforts to negate the circuit split by artificially narrowing the question presented in this case. Like respondent, the Solicitor General contends that the only question presented is whether a state

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[3] (...continued)
has never challenged the authority of Congress to enact federal statutes that limit the scope of the federal bankruptcy laws. *See* Pet. at 13 n.11. The issue in this case is not whether one federal statute trumps another, but whether state law will be allowed to trump federal law.

[4] Thus, the proper analogy here is not between a reorganized entity and all other businesses, but between a reorganized entity and all other businesses *that commenced operations on or after the date of the federal bankruptcy discharge.*

statutory cause of action that arises after a federal bankruptcy discharge may be applied to pre-discharge conduct. A state *common-law* cause of action that arises after a federal bankruptcy discharge, the Solicitor General insists, presents a "distinct" issue. *See* U.S. Br. at 17. This is the quintessential distinction without a difference.[5]

For federal bankruptcy purposes, it is immaterial why, in any particular case, a cause of action arises *after* the underlying conduct on which it is based. It may arise by virtue of the enactment of a new statute, or it may arise by virtue of a host of other "future event[s]." U.S. Br. at 18. The Solicitor General offers no reason why a post-discharge cause of action based on the common law may be characterized as "contingent," but a post-discharge cause of action based on a statute may not. There are any number of reasons why a given cause of action may not arise until long after the facts on which it is based—the maturation of a loan guaranty, the prolonged latency period of an illness, the creation of a new employee right, the enactment of a new statute, or a change in substantive common-law rights (*e.g.*, an expansion of successor liability). In each of these instances, and many others, allowing new post-discharge claims under state law would threaten the central objectives of the federal bankruptcy laws—equal treatment of all creditors and a "fresh start" for the reorganized entity.

Thus, the Solicitor General's effort to narrow the question presented in this case rests upon nothing but the same semantic sleight-of-hand previously attempted by respondent. The Solicitor General's assertion that the cases criticizing *Frenville* all involved a "cause of action that was in existence at the time

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[5] Indeed, so desperate is the Solicitor General to narrow the question presented that he actually declares that "there is little likelihood that a conflict will develop among the courts of appeals over the question whether the MTCA creates new liability distinct from prior state law." U.S. Br. at 17.

of the bankruptcy," U.S. Br. at 18, is untrue in all but in the most theoretical sense. *None* of those causes of action was in existence at the time of the bankruptcy; none of them had accrued until subsequent developments that postdated the bankruptcy discharge. Indeed, they might never have accrued, just as the Washington state legislature might never have enacted the MTCA; they were not simply "unripe," but again, there was *no* "existing cause of action at the time of the bankruptcy." *Id.* The crucial point is that none of these subsequent events, whatever their significance under state law, can be allowed to trump a federal bankruptcy discharge in a closed case.

The Solicitor General also attempts to deny the circuit split by emphasizing that the Seventh Circuit did not cite *Frenville* below. *See* U.S. Br. at 18. That is true but irrelevant, as the Seventh Circuit *did* apply *Frenville*'s reasoning. Instead of citing *Frenville* directly, the Seventh Circuit cited another Third Circuit case, *In re Penn Central Transp. Co.*, 944 F.2d 164 (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992), which in turn relied on *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985), which in turn relied on *Frenville*. *See* App. at 33a, 3a; 944 F.2d at 167-68; 758 F.2d at 943. The Solicitor General implicitly acknowledges that *Penn Central* is aligned with those cases (which he favors) that accord with and descend from *Frenville*. *See* U.S. Br. at 16-18. That point has been underscored by the Third Circuit itself, which in the second round of the *Penn Central* litigation expressly relied on *Frenville* and pointedly reaffirmed its continued adherence to the *Frenville* analysis, despite its recognition of the mounting criticism from other courts. *See In re Penn Central Transp. Co.*, 71 F.3d 1113, 1117 n.5 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1851 (1996).

By adopting the *Frenville* analysis in this case, the Seventh Circuit has now intensified the existing circuit split. As the Solicitor General concedes, the Fourth and Ninth Circuits have

expressly rejected *Frenville* and held that a federal bankruptcy discharge bars a subsequent state-law claim when "the potential claimant has sufficient notice" of the pre-petition conduct so that the potential liability is within the parties' "fair contemplation" at the time of the bankruptcy. *See* U.S. Br. at 17-18 (citing *In re Jensen*, 995 F.2d 925, 930-31 (9th Cir. 1993); *Grady v. A.H. Robins Co.*, 839 F.2d 198, 201-03 (4th Cir.), *cert. dismissed*, 487 U.S. 1260 (1988)). If the Seventh Circuit had followed this analysis, rather than the *Frenville* approach, petitioner would have readily prevailed in light of the manifest environmental problems at the Tacoma railyard that doomed respondent's attempt to circumvent the bankruptcy discharge with its CERCLA claims. Similarly, the Solicitor General acknowledges that the Eleventh Circuit has expressly rejected *Frenville* and held that a federal bankruptcy discharge bars a subsequent state-law claim wherever there is "a significant pre-petition relationship between the debtor and the potential claimant." *See* U.S. Br. at 17 (citing *In re Piper Aircraft Corp.*, 58 F.3d 1573, 1577 (11th Cir. 1995)). If the Seventh Circuit had applied this test, rather than the *Frenville* approach, petitioner would again have readily prevailed in light of respondent's extensive involvement in the Milwaukee Road bankruptcy. Notwithstanding the Solicitor General's semantic contortions, the fact thus remains that the result in this case would have been different had it been filed in these other circuits—the very definition of a circuit split.[6] This particular

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[6] *See also Franklin Sav. Ass'n v. Office of Thrift Supervision*, 31 F.3d 1020, 1022 (10th Cir. 1994) (noting the "split in authority regarding when a right of payment of an unmatured claim arises for bankruptcy purposes"); *In re Hemingway Transp., Inc.*, 954 F.2d 1, 8 n.9 (1st Cir. 1992) (refusing to follow *Frenville* and noting that "more recent decisions consistently have declined to accept the *Frenville* reasoning and its failure to accord full breadth to the term 'claim'"). The Bankruptcy Courts are also split over *Frenville*. *Compare In re Barrett*, 136 B.R. 387, 395 (Bankr. E.D. Pa. 1992); *In re Adams*, 106 B.R. 811, 823 (Bankr. N.J. 1989) *with In re Fairchild Aircraft Corp.*, 184 B.R. 910, 923 (Bankr. W.D. Tex. 1995); *In re*

split is especially undesirable, as it encourages forum-shopping under the federal bankruptcy laws, where the Constitution specifically seeks the establishment of "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4.

4. Although the Solicitor General endorses the decision below and urges this Court to deny review, he does not deny the practical significance of this case. Indeed, even if the Solicitor General were correct that the question presented here could reasonably be limited to the validity of state attempts to impose new *statutory* (as opposed to *common law)* liability based on pre-discharge events, the issue is still of immense importance. The Solicitor General's brief takes no account of numerous letters that he received from entities that currently are or previously were involved in a bankruptcy reorganization. Such of those letters as petitioner has been able to obtain are attached as Appendix B. The letter from the American Financial Group, in particular, notes that the company has invested "hundreds of millions of dollars in reorganizing companies" over the past thirty years, but will not continue to invest in reorganizing businesses until this disparate application of the bankruptcy laws is righted, because investors cannot now "rely on the finality of discharge and a fresh start for the debtor." *See* App. at 11a. These letters vividly illustrate the harm wrought by decisions like the one below and *Fremville*, and underscore the need for this Court to address and clarify this unsettled corner of the law.

5. There is yet another reason why the issue raised in this case is of substantial importance to the lives of millions of Americans and to the United States Treasury. The Pension

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Edge, 60 B.R. 690, 704 (Bankr. M.D. Tenn. 1986). The latter split alone is enough to warrant this Court's review of this important federal bankruptcy issue. *See, e.g., Davenport*, 495 U.S. at 557 ("To address a conflict among Bankruptcy Courts on this issue, we granted *certiorari* . . . . ").

Benefit Guaranty Corporation, created by Congress in 1974, is an independent federal agency entrusted with insuring and protecting the pension benefits of more than 30 million Americans who work in the private sector and their dependents. *See PBGC v. LTV Corp.*, 496 U.S. 633, 636-40 (1990). The PBGC plays an increasingly important role in many corporate reorganizations. *See, e.g.*, Daniel Keating, *Chapter 11's New Ten-Ton Monster: The PBGC and Bankruptcy*, 77 Minn. L. Rev. 803 (1993). In its petition for *certiorari* in the *LTV* case, which itself arose out of a prolonged Chapter 11 proceeding, the PBGC noted that it deals regularly with bankrupt employers and "has a docket of more than 600 active bankruptcy cases." Petition for Certiorari in *PBGC v. LTV Corp.*, U.S. No. 89-390, at 26.[7]

As shown in an accompanying memorandum that petitioner has compiled from public sources, the PBGC has become a direct stakeholder with substantial equity interests in a number of reorganized entities. *See* Appendix C. Thus, for example, the PBGC received a $375 million general unsecured claim in the Continental Airlines bankruptcy settlement, which was satisfied by the issuance of common stock in the reorganized entity. Similarly, in the Kaiser Steel bankruptcy proceeding, the PBGC became a 28% shareholder in the reorganized company, and in the TWA bankruptcy proceeding, the PBGC received notes payable by the reorganized company worth a total of $244 million as well as more than four million shares of common stock. These examples and the others set forth in Appendix C show that the PBGC has a direct and very substantial interest in maintaining the integrity of the federal bankruptcy process against the imposition of new state-law

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[7] Congress has granted the PBGC its own independent litigating authority, *see* 29 U.S.C. § 1302(b)(1), so that the Solicitor General is neither under any obligation nor in a position to recognize and represent the PBGC's important interests in the bankruptcy issue raised in this case.

liability based on based on pre-discharge events. The PBGC thus shares the same interest as potential investors and reorganized companies in ensuring that—in *all* circuits, not just in some—a bankruptcy discharge provides the essential "fresh start" at the heart of the federal bankruptcy laws.

6. The decision below poses a fundamental threat to the efficiency and integrity of the federal bankruptcy process. The Seventh Circuit held, and respondent and the Solicitor General agree, that petitioner is subject to potentially enormous liability for conduct by its predecessor that occurred years *before* a federal bankruptcy discharge under a state statute that was not enacted until years *after* the discharge. The decision below thus allows state law to circumvent the discharge and thereby to undermine the constitutionally-rooted uniformity of the federal bankruptcy laws. This Court should resolve the circuit split presented in this case by firmly rejecting any such notion of "reverse preemption."

CONCLUSION

The petition for writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX A

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FROM: Elizabeth Warren /s/ EW

DATE: November 6, 1996

RE: Petition for Certiorari for CMC Heartland Partners v. Union Pacific Railroad Company

I have no doubt that every party who comes to the Justice Department asking for help persuading the Supreme Court to grant certiorari argues that the legal issue presented to the court is of the utmost consequence. In this case, however, the claim that the disputed legal issue relates to the very heart of an important part of the legal system is not even a slight exaggeration. The extent to which a bankruptcy filing resolves all the claims based on the debtor's pre-filing past is a question that goes to the essence of what bankruptcy should accomplish.

The Seventh Circuit opinion in *CMC Heartland Partners v. Union Pacific Railroad Company*—like that of the Third Circuit in *In re Frenville Co.*—sharply narrows the range of options available to a bankrupt business to deal with all the parties who may claim its assets. If allowed to stand, the implications of these decisions of failing businesses, for those who are trying to put the assets of those businesses back into productive use, for those who face uncompensated injuries, and for those who have other claims against the business are profound. This is not a simple case of debtor versus creditor, a decision in which favoring one party necessarily injures

another. Instead, this is question about the scope of the bankruptcy laws, about whether they provide a final opportunity to separate the activities of the debtor's pre-bankruptcy past from those of its post-bankruptcy future, and whether all claimants from that past have a right to treatment on an equal footing. When a broad question of scope has been raised by the circuit courts, it deserves the timely attention of the Supreme Court. This is particularly so where, as here, there is a growing conflict among the circuits on the proper resolution to that question.

In this case, long after the Milwaukee Railroad (predecessor in interest to CMC Heartland) filed its bankruptcy and confirmed a plan of reorganization, Union Pacific Railroad is now alleging that it has a right to collect on its pre-bankruptcy indemnification claim. toxic spills—and had a full opportunity to participate in the bankruptcy which it took advantage of, the company claims that the indemnification obligation survived. According to Union Pacific, the only obligations that were discharged in bankruptcy were those indemnification claims it might assert under the laws as they stood at the moment of the bankruptcy discharge. The Seventh Circuit agreed, holding that any new legal basis for liability against a party to whom the debtor once owed indemnification, such as the passage of another environmental law, was adequate to revive the moribund indemnification claim. If this view of claims revival stands, any change in status that creates a new payment obligation for beneficiaries of indemnification, such as a change in state caselaw or statutory law, creates a new claim against a post-bankruptcy entity. This result threatens the essence of a bankruptcy discharge.

Background: The Claims Process in the Bankruptcy System

A few years ago, I was asked by the Federal Judicial Center to write a summary of the operation of the business bankruptcy system, explaining the most important features in non-technical language for use by the non-specialist federal

courts. In the resulting book,[1] which was reviewed by judges throughout the federal system before publication, claims are featured prominently in the first substantive chapter. I explain the starting point of bankruptcy law for both liquidations and reorganizations:

> A profound shift in the relationship between debtors and creditors occurs at the filing of a bankruptcy petition. A new estate is created, comprising both the legal and economic interests of the old debtor and the collective economic and legal interests of the creditors. Creditors lose their individual collection rights against the debtor, and they are forced to deal with an estate operating on behalf of all the creditors.[2]

This fundamental shift is captured more vividly in the claims process:

> The transformation of claims against a debtor into claims against an estate protects the collective nature of the bankruptcy proceeding. By converting creditors' claims against the pre-bankruptcy debtor to claims against a bankruptcy estate, the Code gives the estate manager a position to account for, to monitor, and to value each charge against the estate's assets.[3]

The extent to which the bankruptcy system forces all parties who may call on the debtor for payment into a collective proceeding is governed by the interpretation of the claims provisions first in the Act in section 77 and then in the

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[1] Elizabeth Warren, *Business Bankruptcy* (Federal Judicial Center 1993).

[2] *Id.* at 61.

[3] *Id.* at 61-62.

Code in section 101(5). If this provision is given a narrow reading, the impact on the bankruptcy process is profound: bankruptcy will deal with less than all of the obligations arising from the pre-bankruptcy behavior of the debtor. If the provision is read broadly, then a bankruptcy case may reasonably deal with all the obligations incurred by the debtor, creating a cleavage between the debtor's pre-filing past, which will be dealt with collectively, and the debtor's post-filing future, in which parties may deal individually with the surviving entity.

The practical implications of this difference are enormous. If an obligation of the debtor is not dealt with in the bankruptcy, then the obligation may survive after the bankruptcy case is completed. In some cases, this means that creditors who have a claim tied to the debtor's pre-bankruptcy past may disrupt the debtor's post-bankruptcy future. A claimant who is not dealt with in the collective bankruptcy proceedings, for example, and whose claim is therefore not processed and paid on par with other claimants, may come back to the surviving business after a plan is confirmed to assert claims for compensation that disrupt the post-filing debtor's business.

The Importance of this Issue to the Bankruptcy System

The question of what claims shall be covered in a bankruptcy proceeding involves the distributional issues at stake in any bankruptcy action:

> The claims process is critical to the distributional objectives of the Code. As claims are estimated, valued, and assigned certain priority rights, the distributional scheme of the bankruptcy system comes to life. Whether an obligation owed by a debtor becomes a claim—and can thus be discharged—raises a critical distributional question among competing creditors. Similarly, the discharge of claims or the rewriting of payment

> obligations over time necessarily distributes the assets of the estate among competing parties.[4]

If a creditor is denied the opportunity to participate in a final distribution by a failing debtor, the Bankruptcy Code fails to deliver its promised equality of treatment. Similarly, if a creditor can profit from reserving some part of its claim and later collect more from the surviving business, the distributional goal of equality of treatment among creditors is also violated.

A corollary to the equality-of-distribution argument is the reinvestment argument. A principle function of bankruptcy is to preserve the going concern value of a failing business, permitting the business to remain intact rather than to be liquidated for pro rata distribution to its creditors. The creditors of the failing business must be paid at least as much as they would have gotten in the liquidation (a requirement of § 1129(a)(9)), and the going-concern premium can fund higher payments. The business, and the jobs it supplies, can be preserved without imposing additional injury on the creditors. A large part of preservation of going-concern value depends on new capital investment. New money can flow into a business only if the new investors can be certain that old liabilities have been identified and dealt with.

One reason the bankruptcy laws use a very expansive definition of "claim" is to resolve ALL claims—potential and actual, matured and unmatured, contingent and non-contingent, liquidated and unliquidated. If there were unresolved claims outstanding, then new investments in the failing business would be sharply curtailed. Investors would buy assets at lower prices from liquidation sales rather than invest in reorganizing businesses.

In the late 1980s, I engaged in a lengthy debate with Professor Douglas Baird about bankruptcy policy.

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[4] *Id.* at 61.

Notwithstanding our differences on a number of points about striking the appropriate balance between debtors and creditors, we agreed on the critical importance of including all parties who may raise a claim against a debtor for its pre-filing behavior in a single bankruptcy action:

> The bankruptcy system equalizes the treatment of creditors and parties affected by business failure when timing variations leave them with very different formal rights. . . . The Code generally minimizes the consequences of timing differences among the debtor's prepetition creditors as it reorders claims based on an underlying similarity of rights. [footnote omitted][5]

Any decision, such as those in *CMC Heartland* and *Frenville*, that leaves the new business with the risk of unknown, unquantifiable losses that may arise in the future directly undercuts the ability of the business to reorganize in bankruptcy, to maximize its returns to its unpaid creditors and to survive as an employer. If a shift in state law suddenly imposes new losses on a business long after its reorganization is complete, the cost of investing in bankrupt business has just risen sharply.

One final point about the impact of a decision about when a bankruptcy claim arises is in order. That question is implicated in the most difficult cases facing the courts over the next dozen years. Environmental claims, product liability claims, and mass tort claims, for which we have currently only seen the tip of the iceberg, are multiplying against American businesses. A significant number of those businesses will find their way into the bankruptcy courts in the next two decades. At the same time, emerging business practices mean that large

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[5] Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 Mich. L. Rev. 336, 358-59 (1993).

business purchases are now routinely accompanied by indemnification clauses, so that all companies—including those facing financial difficulties—are more likely to have a collection of outstanding indemnification obligations. If the Seventh Circuit opinion in *CMC Heartland v. Union Pacific* stands, every change in state law that alters the potential responsibility of a party—extensions of statutes of limitations, expansions in the sweep of liability principles, development of third-party liabilities—will threaten to unravel bankruptcy reorganizations long-since thought to be settled. Financial reorganization of complex entities will become almost impossible.

If hastily made judicial decisions constrain the reach of the bankruptcy system to deal with the problems identified here, it will be no victory for judicial economy. Instead, decisions creating false boundaries that limit which claims can be collectively treated in a bankruptcy case will spawn countless more cases, as parties dispute whether their particular facts fall inside or outside the newly modified claims definition. Moreover, parties will spend the intervening time maneuvering for position in and out of the bankruptcy system rather than submit their difficulties to a single forum for a unified resolution. Variations in state law, rather than uniform interpretation of the federal bankruptcy laws, will dominate the system. Only by keeping the scope of bankruptcy discharge orders broad, as Congress intended and as the Supreme Court has thus far consistently ruled, can bankruptcy serve as a forum to resolve multiple disputes without expending endless resources on disputes about whether the proceedings include all the disputants.

The kinds of obligations drawn into the bankruptcy process as claims against the estate powerfully affect both the collective nature of the bankruptcy proceedings and the distributional impact of bankruptcy. The lines that are drawn to determine which obligations are included within the bankruptcy discharge are the lines that determine whether the

bankruptcy goals of equality of treatment among creditors and preservation of the going concern value of a business can be realized.

Any decision that limits the scope of bankruptcy discharge orders has a powerful impact on the bankruptcy system. Such a decision will constrain the ability of the parties to settle all disputes related to a debtor's pre-bankruptcy past in a single forum. It will encourage both strategic behavior and multiple lawsuits. It will undermine the central principle of the federal bankruptcy laws—to treat like claimants alike—leaving those with pre-filing injuries to a collective treatment in the bankruptcy proceeding while those whose injuries arise later founder alone, sometimes receiving much better subsequent treatment and other times receiving no compensation at all.

I urge the Justice Department to support the granting of the Petition for Certiorari in *CMC Heartland Partners v. Union Pacific Railroad Company*. The issue will not disappear, and continued uncertainty and division among the circuits will only heighten the costs imposed on all the parties who are trying to deal with claims against a failing company.

APPENDIX B

AMERICAN FINANCIAL GROUP

November 15, 1996

VIA FAX: 202-514-9769
AND EXPRESS MAIL

Walter E. Dellinger
Solicitor General of the United States
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: Petition for Certiorari: CMC Heartland Partners v. Union Pacific Railroad Company, Supreme Court No. 96-44

Dear General Dellinger:

I write at this time to urge you to support the granting of certiorari in the referenced matter. This case raises an issue which has enormous repercussions for companies like ours that regularly invest in reorganizing companies. Over the last 30 years our company has invested hundreds of millions of dollars in reorganizing companies. We were willing to make such investments in reliance upon the fact that the bankruptcy would discharge claims arising from the preconsummation conduct of the debtor. Unfortunately, in light of the Seventh Circuit's decision in *CMC Heartland* and the Third Circuit's decisions in *In re Frenville* 744 F.2d 332 (3d Cir. 1984) *cert. denied* 469 U.S. 1160 (1985) and its progeny, similar investments now are not only imprudent but dangerous. These decisions undermine the fundamental bankruptcy principles of finality and fresh start and allow claims to remain pending as a sword hanging over the reorganized company and its new investors. Until

these erroneous decisions are corrected, our company will not invest in reorganizing businesses.

Our concerns are not imaginary or hypothetical. Today our company is defending itself from the threat of serious financial loss as a result of the Third Circuit's jurisprudence in this area which, like the Seventh Circuit in *CMC Heartland*, erroneously narrows the scope of a bankruptcy discharge contrary to the express intent of Congress. The Third Circuit cases in question—*In re Penn Central Transportation Co.* (Paoli Yard), 944 F.2d 164 (3d Cir. 1991) *cert. denied* 503 U.S. 906 (1992) and *In re Penn Central Transportation Co.* (USX) 71 F.3d 1113 (3d Cir. 1995), *cert. denied* 116 S. Ct. 1851 (1996)—involved our subsidiary, The Penn Central Corporation (n/k/a American Premier Underwriters, Inc.). *Paoli Yard* involved a CERCLA claim to recover environmental remediation costs and *USX* involved a contribution claim to recover antitrust damages. In both cases there was no dispute that the alleged conduct giving rise to the claims was conduct of the debtor, not the reorganized company, and that all of this conduct occurred prior to consummation. Indeed, the alleged offending conduct in both cases began in the 1950's, more than 20 years before consummation and nearly 40 years before claims were asserted against the reorganized company. Nevertheless, the Third Circuit, applying the same erroneous definition of when a claim arises as the Seventh Circuit, ruled that the reorganized company could be held liable for claims arising from the preconsummation conduct of the debtor. Obviously, our company as a new investor in the reorganizing debtor had no knowledge of, involvement with or control over such conduct.

The Third and Seventh Circuit jurisprudence obliterates well-established bankruptcy policies of finality and fresh start. These courts have judicially determined (contrary to legislative intent) that massive claims can survive consummation and discharge. Consequently, our subsidiary, the reorganized company, is now defending itself from over $700 million in

claims arising exclusively from the preconsummation conduct of the debtor. It is especially egregious that the result in every circuit other than the Third and Seventh would be the opposite—these claims would have been found to have been discharged. Until this disparate application of the bankruptcy laws is righted, investors will not take a stake in reorganizing companies because they cannot rely on the finality of discharge and a fresh start for the debtor.

Very truly yours,

/s/Carl H. Lindner

CHL/hkc

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PRIVILEGED & CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION

November 13, 1996

The Honorable Walter Dellinger
Solicitor General of the United States
Office of the Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Re: CMC Heartland Partners v. Union Pacific R.R.
U.S. No. 96-44

Dear Mr. Solicitor General:

It has come to our attention that the Supreme Court has asked the Solicitor General to state the views of the United States about whether the Court should take review of the *CMC Heartland Partners* case on an important issue at the intersection of bankruptcy and environmental law. On behalf of Continental Airlines, Inc., a former chapter 11 debtor, I urge the Solicitor General to respond in favor of review.

The issue in this case is an important one for former chapter 11 debtors such as Continental Airlines. The issue is the effectiveness of the discharge obtained under the Bankruptcy Code against causes of action newly minted under state law but premised on conduct occurring prepetition. From Continental's standpoint, any uncertainty as to the scope of the discharge obtained by chapter 11 debtors upon confirmation of a plan of reorganization is undesirable.

Having emerged from bankruptcy in 1993, Continental Airlines has proven to be one of the more successful chapter 11 reorganizations in recent years. Under Continental's plan of reorganization, unsecured creditors received a combination of cash and shares of common stock. Continental's common stock has increased in value eight-fold since the plan became effective. The reaction of the stock market to CAL's successful reorganization would likely have been far less enthusiastic (and creditors who continued to hold stock would have been far less fortunate) if the discharge in bankruptcy were not effective as to all claims. The possibility that discharged liabilities could be resuscitated by the acts of a state or local legislative body would have created significant uncertainty as to the company's liabilities and presented unknown risks to investors in the company, to the detriment of the company, its employees and its shareholders.

Because these concerns raise important public policy issues regarding the uniform federal application of the Bankruptcy Code, the Solicitor General has an important stake in the outcome of this case. The United States also has an interest in preserving the effectiveness and finality of the bankruptcy discharge as a creditor asserting claims against debtors throughout the country. That is true for two reasons. First, the decision in this case allows state and local governments to create false priorities that in effect trump the priority of unsecured creditors such as the United States. Second, through the Pension Benefit Guaranty Corp., the Internal Revenue Service, the Environmental Protection

Agency, the Department of the Interior, and other federal agencies, the United States has asserted claims in bankruptcy against numerous chapter 11 debtors, resulting in the distribution to the United States of shares of common and preferred stock in the reorganized company. Allowing states to circumvent the bankruptcy discharge could reduce the value of such holdings.

Finally, there is the issue of delay. In many cases, final distributions to creditors under confirmed plans of reorganization are withheld until all claims have been resolved. Uncertainty as to liabilities that may be imposed makes it exceedingly difficult for a chapter 11 debtor to close out the bankruptcy process. The result of such uncertainty could be a delay in payments to creditors and an open-ended, Dickensian bankruptcy process.

For these reasons, I urge the Solicitor General to support the granting of the Petition for Certiorari in *CMC Heartland Partners*. What is sorely needed in this complex area of law is more uniformity, more certainty, and more clarity. That need raises an issue of national interest deserving of the Court's involvement.

Thank you for your consideration in this matter.

Very truly yours,

/s/Peter M. Gillon
Peter M. Gillon

PMG/mar
cc: Jennifer L. Vogel
Vice President, Legal
Continental Airlines, Inc.

AVATAR HOLDINGS INC.

November 18, 1996

The Honorable Walter Dellinger
Solicitor General of the United States
Office of the Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Re: CMC Heartland Partners vs. Union Pacific R.R. U.S. No. 96-44

Dear Mr. Solicitor General:

In my capacity as General Counsel for Avatar Holdings Inc. f/k/a the GAC Corporation, I am forwarding this letter to you to address the pending *CMC Heartland Partners* case. The sole issue in the case as presented before the United States Supreme Court is when a "claim," as defined for purposes of the federal bankruptcy laws, will be deemed to arise in a federal bankruptcy proceeding when the underlying cause of action is based on state law. This issue is one of great importance to many of the reorganizations, including the reorganization involving Avatar Holdings Inc., that are regularly effected under federal law. In light of the fact that the Supreme Court has asked the Solicitor General to state the views of the United States about whether the Court should take review of this issue on the merits and settle it conclusively as a matter of federal bankruptcy law, I am hereby urging you to respond in favor of the Court rendering a decision on this important issue.

I have reviewed the Memorandum of Kirkland & Ellis forwarded to you dated November 5, 1996, and the

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Memorandum referenced therein prepared by Professor Elizabeth Warren dated November 6, 1996, and I am totally in agreement with the reasoning, problems and implication issues expressed therein. Continued uncertainty in this area will hamper reorganizations by leaving all the entities involved uncertain about whether the central aims of the federal bankruptcy laws will be met in their particular circumstances. One of the main, if not the main, objectives of the Congress in enacting the Bankruptcy Code were to provide for an equitable and comprehensive settlement of the outstanding debts and to allow the debtor to reorganize and thereby achieve a "fresh start" that will allow the underlying businesses to continue in operation, which benefits all of their stakeholders, including employees, customers, and suppliers, rather than pushing them into liquidation. If, as in the *CMC Heartland Partners* case, a reorganized entity can be subjected to liability under state law years after a federal court had granted a federal bankruptcy discharge, based on a new statutory cause of action, then it is clear that the congressional intent embodied in the Bankruptcy Code has been substantially overridden. This unfortunate situation not only will cause great and unwelcome uncertainty by creating a new cloud over federal bankruptcy proceedings, but it will also be unfair to previous creditors whose debts were discharged for lesser amounts and to new creditors who have agreed to invest in the reorganized entity on the understanding that the federal bankruptcy discharge was effective for its intended purposes.

Further, the consequences of this issue are not limited simply to cases of environmental claims, though they are certainly one example of the kinds of situations in which the issue may arise. Instead, this issue has potential significance for all manner of corporate reorganizations or state statute. It also will affect corporate reorganizations where various causes of action do not arise until after the bankruptcy discharge because the underlying conduct did not immediately result in actionable injury, as typically occurs in mass tort cases. In light of recent experience with Chapter 11 proceedings, this means that the

issue of when a claim will be deemed to arise under federal bankruptcy law when the underlying cause is based on state law is of tremendous significance and merits a clear and controlling disposition by the Supreme Court at the earliest possible time. I therefore urge you to suggest that the Supreme Court should seize the opportunity to address this issue in the pending *CMC Heartland Partners* case.

In 1976, the GAC Corporation n/k/a Avatar Holdings Inc. commenced bankruptcy reorganization proceedings in the United States District Court Southern District of Florida and these proceedings concluded in 1981. At that time, this was the biggest bankruptcy in the history of the State of Florida and, to the best of my knowledge, still is the biggest. Therefore, you can understand the extent and potential ramification which this issue could have on Avatar Holdings Inc. as the reorganized company. Rather than get into a long dissertation thereon, it should suffice to say that this issue is considered of paramount importance and that Avatar Holdings Inc. feels strongly that the merits of this issue should be reviewed by the Supreme Court.

Thank you for your attention to this important matter.

Very truly yours,

AVATAR HOLDINGS INC.

/s/ Dennis J. Getman
Dennis J. Getman
General Counsel

DJG/ps

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November 20, 1996

The Honorable Walter Dellinger
Solicitor General of the United States
Office of the Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Re: CMC Heartland Partners v. Union Pacific Railroad, U.S. No. 96-44

Dear Mr. Solicitor General:

I write in reference to the above case. The issue before the United States Supreme Court is to determine the scope of a federal bankruptcy discharge as applied to state-law claims that did not even arise until after the bankruptcy proceeding had already been completed.

This issue is significant for the success of any reorganization. In fact, Uniroyal Technology Corporation is the product of a reorganization under Chapter 11 of the U.S. Bankruptcy Code in which there were a number of environmental issues. If claims had been permitted to arise anew after the bankruptcy process had run its course, the success of the reorganization would have been seriously jeopardized.

I understand that the Supreme Court has formally sought the views of the United States about whether the Court should decide this issue on full review in this case. We request that you advise the Court to do so. Continued ambiguity on

this issue will impede reorganizations by undercutting Congress's main purposes as embodied in the bankruptcy laws. Congress plainly intended to ensure each debtor a fresh start that would enable the business to survive as a going concern and to continue serving its investors and customers, rather than disrupting them all by forcing them to participate in a liquidation of the business. The Uniroyal Technology case is a useful example of the balancing of the interests of all the interested parties, all of whom received something; businesses that had good reason for continued existence were allowed to survive and provide continued employment for over one thousand employees.

If, as in the *CMC Heartland Partners* case, a reorganized entity can be subjected to prepetition liability under state law based on a new statutory cause of action even years after a federal court had granted a federal bankruptcy discharge, then the clear intent of Congress is not being upheld by the courts. This situation also threatens to disrupt the system of treating all unsecured creditors on an equal basis by allowing the new claimants to recover more on their claims than all other claimants were permitted to recover in the now-closed bankruptcy proceeding.

It would appear that the effects of the *CMC Heartland Partners* case are not limited to environmental claims but to any claims that could arise under state law. Such a consequence is clearly inconsistent with the main purposes of the Bankruptcy Code.

In the case of the bankruptcy reorganization resulting in the creation of Uniroyal Technology Corporation, the final Plan of Reorganization was the product of a delicate balance of claims by, among others, suppliers, bondholders, federal and state claimants in respect of approximately twenty superfund sites, the Pension Benefit Guaranty Corporation in respect of an underfunded pension plan and retiree medical claimants. This reorganization, which resulted in the U.S. EPA and the PBGC taking major stock positions in the new company, would

not have been possible if the various claimants had believed that the resolution of claims was not to be final and the reorganized entity was to be subject to later prepetition claims asserted by other creditors. In addition, the financial interests of both federal agencies would have been disserved in the circumstances of the ruling review in the *CMC Heartland Partners* case.

We therefore request that you advise the Supreme Court to seize the opportunity to address this issue in the *CMC Heartland Partners* case. Thank you.

Very truly yours,

/s/ Oliver J. Janney
Oliver J. Janney

OJJ:rah

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Lloyd M. McBride
1934-1983

Edward H. Baker, Jr.
1935-1970

November 12, 1996

Honorable Walter Dellinger
Solicitor General of the United States
Officer of the Solicitor General
U.S. Department of Justice
Washington, DC 20530

Re: *CMC Heartland Partners v. Union Pacific R.R. Co.* U.S. Supreme Court No. 96-44

Dear Mr. Solicitor General:

As counsel to Taracorp, Inc., we have recently been made aware of the fact that your office has been asked by the Supreme Court for its views in connection with a pending petition for *certiorari* filed in this matter. The issue presented to the Court involves the question of when a "claim" under the federal bankruptcy laws will be deemed to arise for purposes of discharge when the underlying cause of action is founded on state law. This issue is significant to many bankruptcy reorganizations, including that of our client, Taracorp, and we strongly believe that the Solicitor General should support review by the Court.

Until the Court decides the issue raised in this case, existing and future bankruptcy proceedings will be unnecessarily hindered. It is clear that Congress' primary purpose in enacting the Bankruptcy Code was to provide for a

comprehensive resolution of the debtor's liability, and to thereafter insure a "fresh start" so that the debtor could continue in business for the benefit of all those persons economically dependent upon its continuing viability, rather than be forced to liquidate to pay its creditors. In *CMC Heartland*, the Court of Appeals for the Seventh Circuit held that an entity reorganized under the bankruptcy laws may yet be subjected to liability under state law notwithstanding bankruptcy discharge, where the claim is based upon a state statute enacted after the bankruptcy concluded. We believe that this decision ignores the substantial Congressional intent reflected in the Bankruptcy Code that debtors should be afforded a fresh start following an equitable distribution of assets to their creditors. This will not occur if prepetition facts can be the basis for non-discharge liabilities based upon state statutes enacted after the debtor's exit from bankruptcy.

Taracorp's experience demonstrates that this concern is not merely hypothetical. Taracorp entered Chapter 11 bankruptcy in 1982. Prior to that time, Taracorp operated secondary lead smelting and fabricating facilities as it continues to do today. Many of the activities commonly employed in the secondary lead business, which occurred before CERCLA became law in 1980, involved the potential for releases of lead and other hazardous substances to the environment; notwithstanding that such activities complied with then-applicable law. Moreover, CERCLA, and statutes like it have been interpreted to have retroactive effect, and attribute liability on a far-broader basis than prior law. For example, in 1979, Taracorp became party to a spent battery "tolling agreement" with Union Scrap Iron & Metal Company, a scrap metal processor in Minneapolis. Union Scrap's services for Taracorp involved processing spent lead-acid batteries to recover scrap lead, which was subsequently shipped to Taracorp. Taracorp ceased doing business with Union Scrap in 1981 and emerged from reorganization in 1985. In 1990, the United States commenced an action against Taracorp and other defendants who had sent spent batteries for

processing by Union Scrap. The allegations against each defendant were that it had "arranged for" the treatment or disposal of a hazardous substance (*i.e.*, lead) by Union Scrap, and therefore was responsible to the United States for costs of remedying the environmental contamination caused by Union Scrap.

Although Taracorp ultimately settled the Unites States' claims against it, the action is illustrative of the problems faced by entities which have emerged from bankruptcy. In this regard, Taracorp's present circumstances are strikingly similar to those of the Petitioner in *CMC Heartland Partners*. Under the Seventh Circuit's interpretation, Taracorp would remain liable for environmental response costs attributable to pre-bankruptcy contamination under any post-1985 statute which might impose such liability, thus impairing Taracorp's "fresh-start" and post-bankruptcy viability.

We urge the Solicitor General to suggest to the Court that review in this case is appropriate to resolve these vitally important issues. Thank you for your attention.

Very truly yours,

/s/Clifton A. Lake
Attorney for TARACORP, INC.

127541

UNR Industries, Inc.

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Phone 312 341 1234
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Victor E. Grimm
Vice President
General Counsel &
Corporate Secretary

November 15, 1996

The Honorable Walter Dellinger
Solicitor General of the United States
Office of the Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

RE: CMC Heartland Partners v. Union Pacific R.R.
U.S. No. 96-44

Dear Mr. Solicitor General:

The pending *CMC Heartland Partners* case has recently been brought to our attention. As you know, the issue in the case as presented before the United States Supreme Court is when a "claim," as defined for purposes of the federal bankruptcy laws, will be deemed to arise in a federal bankruptcy proceeding when the underlying cause of action is based on state law. The issue posed is one of great importance to many reorganizations under federal law. We understand that the Supreme Court has now asked the Solicitor General to state the views of the United States as to whether the Court should review this issue.

We urge you to request that the Court grant the review petition. Continued uncertainty concerning claims under the

Bankruptcy Code will hamper reorganizations by leaving all the entities involved uncertain of the consequences of reorganization under the federal bankruptcy laws. The main objectives of Congress is enacting the Bankruptcy Code provisions concerning reorganizations were to provide for an equitable and comprehensive settlement of all claims and to allow the debtor to achieve a "fresh start" by allowing the underlying business to continue in operation to the benefit of stakeholders, including employees, customers, lenders and suppliers. If, as in the *CMC Heartland Partners* case, a reorganized entity can be subjected to lability under state law years after a federal court had granted a federal bankruptcy discharge based on a new statutory cause of action, then the congressional intent embodied in the Bankruptcy Code will have been substantially undermined. This unfortunate situation not only will cause great uncertainty by creating a new cloud over federal bankruptcy proceedings, but it will also be unfair to previous creditors whose debts were discharged for lesser amounts and to new creditors and investors who have relied on the discharge of previous debts provided by the Bankruptcy Code.

The experience of UNR with reorganization proceedings confirms the importance of the bankruptcy issue raised in this case. UNR Industries, Inc. was reorganized under the Bankruptcy Code in 1989. Under the Plan of Reorganization, 63% of the stock of the Company was transferred to the UNR Asbestos-Disease Claims Trust. The beneficiaries of the Trust are persons with asbestos disease claims based upon exposure to asbestos manufactured by predecessor companies. If state statutes could create new causes of action based on past conduct, a reorganized company such as UNR could be severely threatened and the individual asbestos claimants deprived of compensation for their claims.

Thank your for your consideration in this matter.

Yours very truly,

/s/Victor E. Grimm
Victor E. Grimm

VEG:bfk

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November 8, 1996

The Honorable Walter Dellinger
Solicitor General of the United States
Office of the Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

RE: CMC Heartland Partners v Union Pacific R.R. U.S. No. 96-44

Dear Mr. Solicitor General:

The pending *CMC Heartland Partners* case has recently been brought to our attention. As you know, the sole issue in the case as presented before the United States Supreme Court is when a "claim," as defined for purposes under the federal bankruptcy laws, will be deemed to arise in a federal bankruptcy proceeding when the underlying cause of action is based on state law. The issue posed is one of great importance to many of the reorganizations that are regularly effected under federal law. We understand that the Supreme Court has now asked the Solicitor General to state the view of the United States about whether the Court should take review of this issue on the merits and settle it conclusively as a matter of federal bankruptcy law.

We urge you to respond in favor of the Court rendering a decision on this issue in this case. Continued uncertainty on this point will hamper reorganizations by leaving all the entities involved uncertain about whether the central aims of

the federal bankruptcy laws will be met in their particular circumstances. · The main objectives of the Congress in enacting the Bankruptcy Code were to provide for an equitable and comprehensive settlement of outstanding debts and to allow the debtor to reorganize and thereby achieve a "fresh start" that will allow the underlying businesses to continue in operation, which benefits all of their stakeholders, including employees, customers, and suppliers, rather than pushing them into liquidation. If, as in the *CMC Heartland Partners* case, a reorganized entity can be subjected to liability under state law years after a federal court had granted a federal bankruptcy discharge, based on a new statutory cause of action, then it is clear that the congressional intent embodied in the Bankruptcy Code has been substantially overridden. This unfortunate situation not only will cause great and unwelcome uncertainty by creating a new cloud over federal bankruptcy proceedings, but it will also be unfair to previous creditors whose debts were discharged for lesser amounts and to new creditors who have agreed to invest in the reorganized entity on the understanding that the federal bankruptcy discharge was effective for its intended purposes.

The experience that we have had with reorganization proceedings confirms the general importance of the bankruptcy issue raised in this case. AM International, Inc. has been through two reorganization proceedings under Chapter 11 of the Bankruptcy Code. We believe that to permit a State to create new liabilities based upon prepetition activities, by enacting new statutes after confirmation, would circumvent the discharges obtained in these proceedings, is contrary to the intent of Congress, and jeopardizes the fresh start provided by the discharge orders. A definitive ruling by the Supreme Court is necessary to prevent potential abuse of the bankruptcy process by the States.

The consequences of this issue are not limited to environmental claims, though they are certainly one example of the kinds of situations in which the issue may arise. Instead, this issue has

potential significance for all manner of corporate reorganizations where new causes of action may be created after the bankruptcy discharge because the underlying conduct did not immediately result in actionable injury, as typically occurs in mass tort cases. In light of recent experience with Chapter 11 proceedings, this means that the issue of when a claim will be deemed to arise under federal bankruptcy law when the underlying cause of action is based on state law is of tremendous significance and merits a clear and controlling disposition by the Supreme Court at the earliest possible time. Therefore, we urge you to suggest that the Court should review and address this issue in the pending *CMC Heartland Partners* case.

Thank you for your consideration in this matter.

Very truly yours,

/s/David L. Rutherford
David L. Rutherford
Associate General Counsel

APPENDIX C

Debt & Equity Distributions to Agencies of the Federal Government in Significant Chapter 11 Cases

The United States has multiple interests in reorganization cases under the bankruptcy laws. In all cases, it has an interest in seeing to it that Congress' twin goals—an equitable distribution to claimants and the creation of a viable new entity—are achieved. In many bankruptcies, however, the United States has an additional interest as a direct stakeholder in the reorganized entity. A number of government agencies, including the EPA, IRS, and, most prominently, the PBGC, regularly file claims against companies in bankruptcy reorganization cases, on account of which they receive debt, stock or some other interest in the reorganized entity—including, at times, a substantial equity interest. Those direct financial interests could be adversely affected to a significant degree by the *Frenville* and *CMC Heartland* approach to post-discharge claims.[1] Petitioner has not yet had a full opportunity to pull together all such situations. Nonetheless, information with respect to some is set forth below.

1. ***In re Continental Airlines Holdings, Inc. et al.***, Case No. 90-0093, etc. (Bankr. D. Del.). Pursuant to a settlement, the PBGC received a $375 million general unsecured claim, which was divided into four classes: Class A: $241.0 million; Class B: $103.1 million; Class C: $12.9 million; and Class D: $18.0 million. Each class received varying amounts of shares of Reorganized Continental

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[1] Indeed, one such situation is ubiquitous and built into the statute itself. Under 11 U.S.C. § 1129(a)(9)(C), a debtor is authorized to stretch out payment of prepetition current tax claims, including those of the IRS, over a period as long as six years. The prospect that the IRS would actually receive eventual payment of tax claims under the terms of this statutory provision would be undermined if new post-discharge claims could be asserted against the reorganized entity.

("NewCal") Class A and Class B Common Stock. In addition, pursuant to a settlement with the PBGC and the IRS, NewCal agreed to issue 415,000 to 580,000 shares of New Cal common stock to the Continental Airlines Retirement Plan.

2. ***In re Trans World Airlines, Inc.***, Case No. 95-43748 (Bankr. E.D. Mo.). Pursuant to TWA's plan, the PBGC received, on account of its claim of approximately $345 million, three notes of the reorganized company in the aggregate amount of $244,344,987 and 4,166,167 shares of Common Stock.

3. ***In re Kaiser Steel Corp.***, Case No. 87 B 1552 (Bankr. D. Colo). The PBGC became a 28% shareholder of the reorganized company.

4. ***In re LTV Corporation, et al.***, Case Nos. 86B 11270-11334, etc. (Bankr. S.D.N.Y.). There are four things worth noting. First, the EPA was entitled to a general unsecured claim of $32.6 million for CERCLA cleanup costs ($28.2 million) and natural resource damages ($4.4 million). This claim entitled the EPA to participate in a pool representing 15.9% to 19.5% of New LTV common stock and 18.2% to 22.1% of reorganized LTV Steel common stock. Second, the PBGC received, as part of a settlement with the debtors, Stock Appreciation Rights entitling the PBGC to receive shares of New LTV common stock. Third, New LTV agreed, as part of the PBGC settlement, to issue $126 million of its common stock to its pension plans and to make annual $30 million contributions to the plans from 1992-1997, and $50 million thereafter. Fourth, pursuant to a settlement agreement, the IRS received, among other things, New LTV common stock with a value of $6.5 million.

5. ***In re CF&I Steel Corp.***, Case No. 90B-6721 (Bankr. Utah). Pursuant to the plan of reorganization, substantially all of the debtor's assets were purchased by a partnership in which the PBGC owned a 4.8 % limited partnership interest. A unit of Oregon Steel Mills Inc. owned

the remaining 95.2% general partnership interest. The PBGC had filed claims totaling approximately $337 million.

6. ***In re Wheeling-Pittsburgh Steel Corp.***, Case No. 85-793-4297 (Bankr. W.D. Pa.). Pursuant to the reorganization, the PBGC reeived on its pension claim, among other things, a six-year note in the face amount of $12 million issued by the reorganized company, payable in annual installments of $2 million; the IRS received on its pension tax claim, among other things, a similar six-year note in the face amount of $11 million issued by the reorganized company, payable in annual installments of $1,833,333.

7. ***In re E-II Holdings, Inc.***, Case No. 92-B-43614 (Bankr. S.D.N.Y.). Pursuant to the debtor's plan, the PBGC received a 10-year unsecured note accruing interest at 11.5%. The principal amount of the note is determined according to a formula and appears to be substantial.

8. ***In re Farley Inc***. Pursuant to its plan, the debtor agreed to make 20 quarterly payments of $125,000 to its various PBGC-guaranteed pension plans.

9. ***In re Amdura Corporation***, Case No. 90B-3811E-3816E (Bankr. D. Colo.). The PBGC received an unsecured debenture in the principal amount of $3 million with interest at 1½% over Continental Bank's reference rate, payable over seven years.

10. ***In re Insilco Corporation***, Case No. 91-70021 (Bankr. W.D. Tex.). The EPA received $10 million, half of which was to be paid in stock of the reorganized company, pursuant to a settlement of a $900 million CERCLA claim. (The balance was to be paid in cash from an insurance litigation recovery.) The Deputy Chief of the Environmental Enforcement section, Joel Gross, who presided over this settlement, indicated that the stock would eventually be sold to pay for cleanup activities at Insilco sites.

11. ***In re Eagle-Picher Industries Inc.***, Case No. 1-91-00100 (Bankr. S.D. Ohio). The EPA received a general

unsecured claim totaling approximately $41 million, a penalty claim of $1.1 million (75% of which was subordinated), and an administrative claim of $150,000. The Eagle-Picher Plan contemplates that the EPA will receive, on account of these claims, a pro rata share of a pool of cash, notes, and stock of the reorganized Company.

12. ***In re National Gypsum Co.***, Case No. 390-37213-SAF-11 (Bankr. N.D. Tex.). The EPA received, on account of a $10.1 million cleanup and natural resource damages claim, senior notes, common stock, and warrants of the reorganized company having an estimated aggregate value of $3.3 million.

13. ***In re Uniroyal Technologies, Inc., et al.***, Case No. 91-32791, etc. (Bankr. N.D. Ind.). The EPA (along with Indiana and Wisconsin) agreed to accept stock in settlement of CERCLA claims. Stipulation provides that when particular environmental liabilities of a particular debtor in the Uniroyal Group become fixed, that debtor is given the option of paying the amount in cash, or by distributing its equity securities that have a value equivalent to the fixed amount of the liability.

14. ***In re Munsingwear***, Case No. 4-91-4581 (Bankr. D. Minn.). Pursuant to the debtor's plan the PBGC received stock in the reorganized company of approximately $2 million on account of its claim of approximately $23 million..